

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION  
4 EXXONMOBIL CORPORATION .  
5 Plaintiff, .  
6 VS. . Civil Action  
7 UNITED STATES OF AMERICA, . No. H-10-CV-2386  
8 . Houston, Texas  
9 Defendant. . March 11, 2014  
10 . 4:28 p.m.  
11 . . . . .

10 TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HONORABLE LEE H. ROSENTHAL  
12 MOTION HEARING

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24 PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,  
25 TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

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1 PROCEEDINGS

2 March 11, 2014

3 THE COURT: Go ahead and state your appearances,  
4 please.

04:28:31 5 MR. STEINWAY: Dan Steinway for ExxonMobil  
6 Corporation, your Honor.

7 MR. BUTHOD: Ty Buthod for ExxonMobil.

8 MR. ROWE: Michael Rowe for the United States.

9 MR. LYNK: Brian Lynk for the United States.

04:28:41 10 MR. LONGORIA: Samuel G. Longoria for the United  
11 States.

12 THE COURT: All right, thank you.

13 And I believe there's someone on the telephone?

14 THE CASE MANAGER: They're just listening.

04:28:51 15 MR. ROWE: Yes, your Honor. We have several lawyers  
16 that worked on the recent cases that are just listening.

17 THE COURT: That's fine. Thank you. We have two  
18 major facilities; plus, the other facilities. We have the legal  
19 issues that surround both World War II and Korea. We have some  
04:29:10 20 legal arguments based on the relationship of 113 and 107. And  
21 we have a huge number of factual disputes. Whether they are  
22 material and genuine in ways that preclude summary judgment is a  
23 -- obviously, a critical question.

24 But what is the best way -- given that interplay  
04:29:35 25 of issues, sites, time period, factual issues, and legal issues,

1 what's the best way to structure this time?

04:29:57

2 MR. STEINWAY: Your Honor, we think the best way is to  
3 go through some of the issues that ExxonMobil has laid out in  
4 their motion for summary judgment and requests that we made to  
5 the Court regarding potential rulings on the various issues.

04:30:31

6 THE COURT: All right. Let me ask one question just  
7 sort of at the outset, and it may not -- please don't  
8 misunderstand this as indicating how I intend to rule. If I  
9 were to find that there is not a basis for saying that either  
10 ExxonMobil or the government is wholly responsible and that  
11 instead what is required is both a percentage assessment and  
12 then a trial of the dollar consequence, is there -- would it be  
13 an appropriate case at the assessment stage to have a special  
14 master?

04:31:02

15 Have the parties discussed that at all?

16 MR. STEINWAY: Your Honor, through the years of this  
17 litigation, we have had mediation, as you know, on various  
18 issues; and --

04:31:18

19 THE COURT: I'm not suggesting it for mediation  
20 purposes. This is not a mediator.

21 MR. STEINWAY: Yes, your Honor.

04:31:39

22 THE COURT: This is a special master to whom I would  
23 refer specific issues under the rule and who would make  
24 recommendations to me, make a report, that -- that, obviously,  
25 the parties would have a chance to review.

1 MR. STEINWAY: Often these cases, your Honor, do have  
2 special masters involved; and this may be a very appropriate  
3 case for that to happen.

4 MR. ROWE: Your Honor, the --

04:31:58

5 THE COURT: Of course, that assumes I find that -- the  
6 parties' arguments are somewhat curious because you are, on the  
7 one hand, telling me -- both of you are telling me that, as a  
8 matter of law, undisputed facts entitle each of you to a finding  
9 that you have no responsibility as an operator or -- otherwise  
10 but operator liability is, obviously, critical here; and at the  
11 same time, you are telling me that there are disputed facts  
12 material to deciding whether the other side has any  
13 responsibility -- whether the other side can avoid  
14 responsibility.

04:32:38

15 It's a somewhat odd mixture; and it is, in fact,  
16 recognizing both the large and detailed rejection as disputed of  
17 many of the points that the other side's expert makes in support  
18 of summary judgment. It's -- to put it crudely and at its most  
19 basic, there are so many disputed facts that both sides

04:33:14

20 identified that seem to be so basic to characterizing and  
21 understanding the parties' respected roles that finding, as a  
22 matter of law, that undisputed facts entitle either side to a  
23 finding -- to a judgment that they have no responsibility seems  
24 a stretch. That is not a ruling, that is a comment on the  
04:33:47 25 nature of the task that lies ahead.

1 MR. BUTHOD: Understood, Judge. I would just offer  
2 one -- assuming the premise that the Court gave us, we  
3 understand the notion of the applicability of a special master,  
4 especially, for sort of an allocation conversation.

04:34:01 5 THE COURT: Right.

6 MR. BUTHOD: Where we may differ --

7 THE COURT: Well, the assessment of percentage.

8 MR. BUTHOD: Absolutely.

9 THE COURT: Right.

04:34:07 10 MR. BUTHOD: Where we may differ is we do think it  
11 appropriate by summary judgment for the Court to make a  
12 determination of the government's status as an operator.

13 THE COURT: Sure, sure. And whether ExxonMobil has --  
14 you know, owner of various plants and other roles. If the  
04:34:32 15 government is determined to have a role as an operator, then the  
16 question would arise about involving a special master to assist  
17 me in determining the extent of that role and how it would  
18 translate, with equitable factors taken into account, to a  
19 finding of allocation percentages for the various facilities and  
04:35:04 20 various war periods alleged.

21 MR. BUTHOD: But we do think a threshold determination  
22 about summary judgment would be appropriate.

23 THE COURT: Sure. I'm not suggesting that a special  
24 master would be appropriate for that. Tempting but not  
04:35:18 25 appropriate.

1 MR. ROWE: Your Honor, from the Government's side, the  
2 answer with respect to the special master is that we have a lot  
3 of rules about that that I have to abide by. I will not mislead  
4 you. I think most of them push more in the direction with  
04:35:35 5 regard to prejudgment, otherwise --

6 THE COURT: Well, part of it is expense and I  
7 understand that.

8 MR. ROWE: We haven't spoken about it and we can  
9 certainly talk about it. I understand the point you're making.  
04:35:45 10 I would also like to --

11 THE COURT: It would be helpful if we get to that for  
12 you to identify -- I found lots of cases in which special  
13 masters are used for CERCLA PRP allocation determinations, but I  
14 have not stopped to parse which one of those involved the United  
04:36:03 15 States as the -- as the -- one of two significant parties.

16 MR. ROWE: Certainly, it's not something the Court  
17 should have to do. It's certainly something we could do and  
18 look and see what we've done.

19 THE COURT: That's exactly my question.

04:36:19 20 MR. ROWE: As far as the operator status goes, I think  
21 one of the things the parties agree about is that that makes a  
22 difference in the case.

23 THE COURT: Sure.

24 MR. ROWE: And I think your Honor already understands  
04:36:31 25 it but I just want to be sure going in: That I don't think

1 either side at this point in the proceeding thinks that either  
2 side can get all the way out of the case. For example, even if  
3 you were to determine that the United States was not an operator  
4 of the refinery during wartime, we still owned all of the --

04:36:49

5 THE COURT: That's right.

6 MR. ROWE: Everybody is --

7 THE COURT: Some of them. And that's why I started  
8 out by saying there's a different analysis, obviously, for  
9 various categories of facility.

04:37:03

10 MR. ROWE: I thought -- there was something you said  
11 that made we wonder.

12 THE COURT: No, no, no, no. I certainly agree. But  
13 for some of the facilities that the government didn't ever own,  
14 I think you are trying to say --

04:37:12

15 MR. ROWE: Yes.

16 THE COURT: -- "We're out of here completely."

17 MR. ROWE: Yes, we are.

18 THE COURT: For other facilities where the contractual  
19 and other arrangements were different --

04:37:23

20 MR. ROWE: We're saying "What were we thinking when we  
21 decided to own those plants as a subsidy during World War II?"

22 THE COURT: That may be true. But I think with that  
23 distinction recognized for at least some of the facilities --

24 MR. ROWE: Yes.

04:37:38

25 THE COURT: -- very significant facilities in terms of



1 the remediation issues presented, you are saying --

2 MR. ROWE: Absolutely.

3 THE COURT: -- no PRP liability here.

4 MR. ROWE: Absolutely.

04:37:50 5 MR. BUTHOD: Minor point, Judge: My friend,  
6 Mr. Steinway, has issues with his back. Do we have your  
7 permission --

8 THE COURT: Absolutely.

9 MR. BUTHOD: -- to proceed seated?

04:38:02 10 THE COURT: Absolutely. I feel your pain.

11 So we're back to my first question: What's the  
12 best way to parse these issues to present an argument that would  
13 be helpful to walking through what we have to decide? Do you  
14 want to start with World War II? Do you want to start with --  
04:38:15 15 and just march through, as you did sort of in the briefing, with  
16 Baytown and then moving on to the other major refinery and then  
17 moving on to the other facilities ending with BOW. Does that  
18 work?

19 MR. STEINWAY: Yes, your Honor. We can march you  
04:38:35 20 through fundamental issue of operator liability with respect to  
21 the refinery. It's, obviously, pretty much one of the key  
22 issues.

23 THE COURT: Right.

24 MR. STEINWAY: It might be useful to go through that.

04:38:46 25 THE COURT: All right. I tried to go through as much

1 of the case law as I could in the time and volume available.  
2 For -- when we get to the interplay between 113 and 107 which  
3 kind of faded in the briefing at various times, the Government  
4 submitted notice of supplemental authority; but it appears to me  
04:39:11 5 that to some extent what I'm looking at is a bunch of  
6 conflicting district court cases.

7 Is that the best I can do for guidance here? Not  
8 that I don't have great faith in my colleagues. But is that  
9 where we are? I take it that was your job?

04:39:25 10 MR. ROWE: That was Mr. Lynk's job, your Honor.

11 MR. LYNK: I am prepared during the portion of the  
12 Government's presentation to further address the issues we've  
13 raised about 107, 113, and the interplay.

14 THE COURT: My first question is going to be what's  
04:39:40 15 your best case and what's your worst case?

16 MR. LYNK: You are -- you are certainly, I will  
17 explain, better representing it; but there are issues on which  
18 you may find there's not controlling law and there's a question  
19 of what to follow. There are some issues as to which the  
04:39:55 20 parties may somewhat disagree on whether there is a controlling  
21 precedent.

22 THE COURT: What do you define as controlling  
23 precedent other than Fifth Circuit and Supreme Court?

24 MR. LYNK: Well, I'm thinking of an issue on which  
04:40:05 25 we're going to --

1 THE COURT REPORTER: I'm sorry, I cannot hear you.

2 MR. LYNK: There is -- one of those issues is one on  
3 which we will try to persuade you today that there is Fifth  
4 Circuit law that you can follow, but we will recognize certainly  
04:40:21 5 there that there is a lot division in the case law --

6 THE COURT REPORTER: I'm sorry, I'm having a really  
7 hard time hearing you.

8 THE COURT: You need to use the mike. Standing or sit  
9 down and use the mike, I really don't care which

04:40:31 10 MR. LYNK: We will certainly -- we will certainly be  
11 honest about the fact that these issues are still in flux  
12 throughout the Courts, and I think what we can try to do in our  
13 oral presentation today is maybe at least give you a better  
14 picture of how confident you are about what direction the  
04:40:56 15 jurisprudence has taken on some of those issues.

16 THE COURT: Okay. And I'm going to hear from both  
17 sides on that, obviously.

18 Is that your division of the case, Mr. Buthod?

19 MR. BUTHOD: You're giving us too much credit. I  
04:41:08 20 don't know yet what my division on the case is yet.

21 THE COURT: Okay. So are we going to start with  
22 Baytown and World War II.

23 MR. STEINWAY: Yes, your Honor. We've handed out a  
24 couple of demonstratives. I don't know if that would be helpful  
04:41:22 25 for you, your Honor.

1 THE COURT: I think I got my own copy, Brian. Or did  
2 I?

3 Yes, I did. Thank you.

4 Here, this is for you.

04:41:34 5 I have a wonderful law clerk helping me on this.  
6 So thank you for providing materials for him as well as for me.

7 MR. STEINWAY: Yes. We thought it would be useful,  
8 your Honor, to take a look at Exhibit Number 1 in the  
9 demonstrative or Demonstrative Number 1 because that is a --  
04:41:51 10 just a map of the layout of the Baytown refinery; and I'll be  
11 brief about this, your Honor.

12 But I thought it would be helpful just to point  
13 out a couple of the key highlights about the facility. One, as  
14 you will note, there on the right-hand side of Demonstrative  
04:42:12 15 Number 1 is a red outline area. That identifies the refinery,  
16 and I'll just point out a couple of terms there for your  
17 information.

18 In the middle you will see "Refinery FOA." And  
19 that stands for the refinery Facility Operations Area. And that  
04:42:33 20 is a regulatory term that connotes right now the fact that Exxon  
21 at Baytown is going through a review of the facility on a full  
22 refinery operational basis. And that's connoted in red.

23 If you look, your Honor, to the left in blue, you  
24 will see in a box "Chemical Plant FOA." That connotes the  
04:43:03 25 Facility Operations Area review undertaken under Texas

1 environmental regulatory authorities for the chemical portion of  
2 the facility.

3           The chemical portion of the facility includes the  
4 Plancor facilities you will see; and the Plancors, we refer to  
04:43:22 5 that term, your Honor, as the Defense Plant Cooperation  
6 facilities that were built during the war. And there are three  
7 Plancors there located on the left-hand side, and I'll just move  
8 up from the bottom to the top.

9           Plancor 1082 was the old butyl rubber plant, and  
04:43:43 10 that was a federal Plancor.

11           Plancor 485 is a butadiene plant. Both of those  
12 Plancors are the subject of this litigation.

13           The third Plancor, 877, is what is referred to as  
14 a copolymer plant. It's where they manufactured different types  
04:43:58 15 of rubber, buna-S rubber, a higher value rubber during the war.  
16 That Plancor is not the subject of this litigation.

17           And I'll just point out --

18           THE COURT: Which one is not?

19           MR. STEINWAY: Plancor 877, your Honor, at the top.

04:44:13 20           THE COURT: Okay.

21           MR. STEINWAY: And I'll just point out to you a couple  
22 of the water bodies because we'll refer to them throughout the  
23 course of the litigation. You'll see Scott's Bay there on the  
24 left-hand side; and to the right -- moving to the right, you'll  
04:44:26 25 see Mitchell Bay, you'll see the Houston Ship Channel, and Black

1 Duck Bay.

04:44:41

2 And one of the interesting features, just  
3 generically, that I would like to point out to you, your Honor,  
4 is that the operational part of the plant is generally located  
5 at the top and the flow of refinery wastewaters generally move  
6 from north to south throughout the plants. And as I -- as we go  
7 to a couple more of these demonstratives, it will be helpful for  
8 you to see how the waste streams function throughout the  
9 facility.

04:44:59

10 If you don't mind, your Honor, if you could turn  
11 to Demonstrative Number 2 for a second --

12 THE COURT: Sure.

04:45:10

13 MR. STEINWAY: -- and I'll be brief about this as  
14 well -- the purpose of this demonstrative was really to show you  
15 one additional Plancor. We will refer throughout the course of  
16 litigation to Plancor 1909. That Plancor was built in the  
17 middle of the refinery at great reluctance by Humble and Exxon  
18 at the time.

04:45:30

19 THE COURT: Why don't you just call it Exxon's  
20 predecessor or something like that, and then -- nobody is  
21 disputing predecessor status for the -- for Humble or Standard.

22 MR. STEINWAY: Yes, your Honor.

23 THE COURT: All right.

04:45:44

24 MR. STEINWAY: This Plancor, just by way of a little  
25 background, is what we call a hydrocodimer plant. And that

1 plant was built very late in the war -- or in the middle -- in  
2 the 1944 time frame in order to make codimer.

3 Codimer is a fundamental octane enhancer that was  
4 used to boost the octane of crude oil up to the hundred octane  
04:46:10 5 level for avgas. There are two ways to make high octane,  
6 100-octane, avgas. One way is through addition of codimer, and  
7 this plant was built by the United -- owned by the United  
8 States; and we submit, your Honor, directed by the United States  
9 to be built there.

04:46:28 10 The other way to make octane -- high octane avgas  
11 is through the alkylate process, and there were already alkylate  
12 facilities there at Baytown. That was used as another way to  
13 enhance crude oil and boost the octane level up to hundred.

14 THE COURT: So the Plancor was owned by the United  
04:46:46 15 States and built within the plant that was owned by Exxon's  
16 predecessor?

17 MR. STEINWAY: Yes, your Honor. And so since we're  
18 just going to focus in right now on Baytown, I'll just point out  
19 a couple more of the demonstratives regarding Baytown that I  
04:47:07 20 thought would be useful -- that we thought would be useful for  
21 you.

22 THE COURT: That's fine.

23 MR. STEINWAY: If you don't mind turning to  
24 Demonstrative Number 4. The purpose of this demonstrative is to  
04:47:18 25 show you the various outfalls of where the wastewaters from the

1 plant deposit into the water bodies. And here, your Honor,  
2 we'll point out to you three outfalls. The first outfall is in  
3 the upper left quadrant. You'll see it marked by a green arrow  
4 with the word "outfall."

04:47:40 5 This is to refer -- and you'll see a box to the  
6 right of the green outfall identified "Rubber Plancors Common  
7 Sewer." That outfall was the sewer that handled the common  
8 wastewaters from the Plancors themselves, the three Plancors;  
9 and that discharged directly into Scott's Bay.

04:48:00 10 THE COURT: Okay.

11 MR. STEINWAY: The second outfall that we would like  
12 to point out to you is the one right near Mitchell Bay there.  
13 And you'll see an outfall with -- and then to the right, the  
14 arrow pointing into Mitchell Bay. That outfall was terminated  
04:48:19 15 in the late '50s. That outfall is near a separator that you see  
16 in the box identified by Separator 2.

17 THE COURT: Is that the separator that you allege the  
18 government prevented you from building earlier and was only  
19 built later?

04:48:35 20 MR. STEINWAY: Your Honor, that separator is a  
21 different separator. That's at Baton Rouge.

22 THE COURT: Okay. That's right. I got them mixed up.

23 MR. STEINWAY: That's called the master separator.

24 THE COURT: You're right. And I apologize. Keeping  
04:48:45 25 them straight has been interesting.



1 MR. STEINWAY: We understand, your Honor.

2 MR. ROWE: There are quite a few separators.

3 MR. STEINWAY: Yes.

4 THE COURT: Yes. All right.

04:48:50 5 MR. STEINWAY: That separator --

6 THE COURT: That was a bad question. Okay. So that  
7 separator was built in the '50s?

8 MR. STEINWAY: It was terminated in the late '50s,  
9 your Honor.

04:49:00 10 THE COURT: When was it built?

11 MR. STEINWAY: In the late 1920s.

12 THE COURT: Okay. So it predates the war?

13 MR. STEINWAY: It predates the war, your Honor.

14 THE COURT: All right, thank you.

04:49:08 15 MR. STEINWAY: I believe it was 1929.

16 And the main outfall that we would like to point  
17 your attention to was on the bottom there really at 6:00  
18 o'clock. You'll see it there in the bottom, right in the  
19 middle; and it's labeled "outfall." And that outfall --

04:49:22 20 THE COURT: Is that the one that's going into Black  
21 Duck Bay?

22 MR. STEINWAY: Yes, your Honor. Right there between  
23 the Houston Ship Channel and Black Duck Bay.

24 THE COURT: I got it.

04:49:33 25 MR. STEINWAY: It actually really goes into the

1 Houston Ship Channel.

2 THE COURT: I see it.

3 MR. STEINWAY: And that outfall is the result of the  
4 lower and upper outfall canal. You will see -- right before the  
04:49:42 5 outfall to the right and you'll see the label "Outfall Canal."

6 THE COURT: I see it.

7 MR. STEINWAY: The lower portion is the portion that's  
8 directly adjacent to the outfall. The upper portion is the part  
9 that goes vertically.

04:49:54 10 THE COURT: All right.

11 MR. STEINWAY: And you'll hear reference throughout to  
12 upper and lower outfall canal.

13 And then the key separator for purposes of  
14 Baytown is Separator 10. When Exxon modernized the wastewater  
04:50:13 15 refinery treatment system at Baytown, eventually the separators  
16 eventually were directed into the modernized Separator 10. So  
17 we think it would be useful --

18 THE COURT: When eventually?

19 MR. STEINWAY: -- to point that out to you, as well.

04:50:29 20 THE COURT: When eventually? What was the -- what was  
21 the date that it was -- the separator was modernized?

22 MR. STEINWAY: I'm sorry, your Honor?

23 THE COURT: What was the date of which you've just  
24 described?

04:50:40 25 MR. STEINWAY: The separator was modernized between

1 1947 and 1957 as part of a waste processing improvement. We  
2 believe it's probably in the mid '50s when it was modernized.

3 THE COURT: All right. So it was not modernized  
4 during World War II?

04:50:58 5 MR. STEINWAY: No, your Honor.

6 THE COURT: Was there any request to modify it during  
7 World War II?

8 MR. STEINWAY: No, your Honor. In 1950 -- that's the  
9 demarcation date. The modernization is, in a sense, the  
04:51:09 10 installation of skimming equipment so that you could skim the  
11 water off the top of the separator. Prior to that date, there  
12 was not sufficient skimming technology employed at Separator 10.  
13 The date of -- that really employed the skimming technology is  
14 either 1950 or shortly thereafter.

04:51:31 15 THE COURT: Okay.

16 I assume the Government will tell me if it  
17 disagrees with any of the statements that are presented via  
18 these exhibits, demonstratives, or described in the explanation  
19 of them?

04:51:48 20 MR. ROWE: I will certainly do that, your Honor. You  
21 should be happy we are saving time because we skipped my first  
22 demonstrative when we get there. I have just a few small  
23 things, not worth --

24 THE COURT: Good, good, good, good.

04:51:59 25 MR. ROWE: I will certainly let you know.

1 THE COURT: Okay, thank you.

2 MR. ROWE: This is mostly things that are --

3 THE COURT REPORTER: I'm sorry, I'm having trouble  
4 hearing you, too.

04:52:08 5 MR. ROWE: I'm sorry. These are mostly issues that  
6 are agreed upon between the parties.

7 THE COURT: All right, thank you.

8 Go ahead.

9 MR. STEINWAY: Your Honor, since you have said we  
04:52:22 10 should focus in on the Baytown --

11 THE COURT: First.

12 MR. STEINWAY: -- plant first, we'll leave for further  
13 deliberation Demonstrative Number 5. That deals with the layout  
14 of Baton Rouge, and we can postpone that.

04:52:35 15 THE COURT: That's fine.

16 MR. STEINWAY: But we feel these three demonstratives  
17 sort of give you a good overview just fundamentally of how the  
18 system works at Baytown in the wastewater refinery.

19 With that, your Honor, I'm going to turn to our  
04:52:50 20 pending motion before the Court. In our motion, your Honor,  
21 ExxonMobil has requested that the Court make the following six  
22 rulings:

23 We requested that the Court find that the United  
24 States was an operator of the refinery and the Plancors and  
04:53:14 25 subject to CERCLA liability under Section 107(a)(2).

1                   We requested -- I'll just limit this to Baytown  
2 right now, your Honor.

3                   THE COURT: Okay.

4                   MR. STEINWAY: We requested that the Court find that  
04:53:35 5 the government is liable as an arranger at Baytown with respect  
6 to wastes that were handled, transported, and generated at the  
7 Plancor 1909, the hydrocodimer plant; and that's Issue Number 2.

8                   Issue Number 3 is we've requested that the  
9 government be subject to joint and several liability under  
04:54:08 10 107(a) with respect to the Baytown facility.

11                   Issue Number 4, we've requested from --

12                   THE COURT: As an operator? And is that --

13                   MR. STEINWAY: An arranger.

14                   THE COURT: For just the Plancor?

04:54:22 15                   MR. STEINWAY: Well, the operator for the refinery --

16                   THE COURT: Right.

17                   MR. STEINWAY: -- and the Plancors.

18                   The arranger liability is just with respect to  
19 the hydrocodimer Plancor facility.

04:54:32 20                   THE COURT: That's what I thought. That's 1909?

21                   MR. STEINWAY: Yes.

22                   THE COURT: All right.

23                   MR. STEINWAY: The fourth issue is we seek a  
24 declaration, your Honor, that the government -- we seek  
04:54:47 25 declaratory judgment relief that the government should be

1 subject to future costs with respect to those -- with respect to  
2 any response costs that Exxon incurs regarding the Baytown plant  
3 and facility.

4           The fifth issue that we've sought relief on is  
04:55:13 5 we've, as an alternative, pled that the government should be  
6 subject to contribution under Section 113(f) (3) (B) of Superfund  
7 with respect to solely the costs incurred regarding the  
8 administrative order on consent covering that facility.

9           And the final issue, your Honor, in the event  
04:55:45 10 that the Court finds the United States liable but not joint and  
11 severally liable, we request that the Court adopt the allocation  
12 methodology that Exxon has presented as part of its summary  
13 judgment motion.

14           We recognize that the Government has already  
04:56:10 15 admitted liability as an owner for the Plancors -- the two  
16 Plancors at Baytown; and we also recognize that many of these  
17 issues, as you've pointed out already, your Honor, will be  
18 subject to the allocation in Phase 2 deliberations. And we  
19 recognize that. So those are -- that's what we seek from the  
04:56:38 20 Court today.

21           And with that, your Honor, if I could turn to the  
22 first issue, the operator liability issue with respect to the  
23 refineries.

24           THE COURT: Am I understanding you correctly that for  
04:56:53 25 -- to the extent you have asked me to rule that the Government

1 is the only liable party, are you now saying that you recognize  
2 that that is unlikely?

3 MR. STEINWAY: We have pled, your Honor, alternatively  
4 why we seek joint and several liability; and we believe the case  
04:57:22 5 law is very strong on that point. We have pled alternatively in  
6 the event that the Court finds that the United States is liable  
7 but not joint and several liability --

8 THE COURT: All right.

9 MR. STEINWAY: -- we felt since Phase 1 of this  
04:57:35 10 litigation -- the litigation was bifurcated to address two  
11 issues in Phase 1 liability and allocation methodology.

12 THE COURT: Right.

13 MR. STEINWAY: We felt it would be helpful to present  
14 to the Court some points that we feel are very important with  
04:57:48 15 respect to the allocation methodology.

16 Frankly, your Honor, as you have noted, there are  
17 many issues of disputed fact. But in our papers, what we've  
18 tried to do is lay out what we think, your Honor, are some  
19 fundamental principles that we think might help guide the Court  
04:58:06 20 in terms of developing an allocation methodology. We think --

21 THE COURT: Although you put them into the liability  
22 portion as opposed to the allocation portion.

23 MR. STEINWAY: Well, your Honor, in our papers, since  
24 Phase 1 deals with liability as allocation methodology --

04:58:20 25 THE COURT: Right.

1 MR. STEINWAY: -- we felt it incumbent to address not  
2 only the liability issues but to give you our views and our  
3 motion on the allocation methodology.

4 THE COURT: I'm not criticizing you for that. I'm  
04:58:36 5 just trying to understand the relationship between the two sets  
6 of arguments.

7 MR. STEINWAY: Yes, your Honor. We -- I think the  
8 fairest way to look at that, your Honor, is we are alternatively  
9 pleading both sides of the coin recognizing there are a lot of  
04:58:52 10 important facts here in this case to consider.

11 THE COURT: All right, thank you.

12 Go ahead.

13 MR. STEINWAY: Your Honor, if I may, I turn to the  
14 first issue which we would like to call the operator liability  
04:59:05 15 issue with respect to the refinery at Baytown. Your Honor, we  
16 think it's important to set a little bit of historical context  
17 as to what happened during the war.

18 At the beginning of World War II, it was  
19 recognized that the United States was incapable of having a --

04:59:28 20 THE COURT: Well, I'm going to cut this short a little  
21 bit. Do you agree with Willie Fletcher's -- Judge Fletcher's  
22 description, which is fairly broad brush, of the historical  
23 background of the petroleum organization and administrative  
24 structure that the government imposed in response to World War  
04:59:57 25 II?



1 MR. STEINWAY: We agree. I mean, that is a very fair  
2 statement.

3 THE COURT: All right. So let's start there. It's a  
4 well presented and very eloquently written description.

05:00:06 5 MR. STEINWAY: Yes, your Honor.

6 THE COURT: All right. So you don't need to repeat  
7 that. I'm going to assume that you just said what he said  
8 there, okay?

9 MR. STEINWAY: Yes, your Honor.

05:00:14 10 THE COURT: Although he was dealing with -- the case  
11 he dealt with was an arranger case, as I recall, and didn't  
12 really deal with where we are now.

13 MR. STEINWAY: Yes, your Honor. In a nutshell, your  
14 Honor, the PAW, the Petroleum Administration for War, basically,  
05:00:31 15 controlled everything about this critical industry, aviation  
16 gasoline. There were two critical industries that had to be  
17 developed and enhanced in order for the United States to  
18 successfully prosecute the war. The first was to develop  
19 adequate 100 octane -- high octane avgas capability. And the  
05:00:52 20 second key component was to develop a rubber industry.

21 From the inception, the government created the  
22 rubber industry, albeit there was some development of -- there  
23 was already some manufacture of 100 octane avgas but not at all  
24 on the levels that needed to be developed and produced in order  
05:01:12 25 for us to prosecute the war.

1 Just to give you some figures, your Honor, before  
2 the war, there were about 44,000 barrels per day capacity of  
3 avgas; and we needed, the estimates were, about 636,000 barrels  
4 per day of avgas. And during the war, at Baytown, the Baytown  
05:01:33 5 production capacity itself for increase in avgas production  
6 increased over 3800 percent, from 1939 to 1944.

7 This was all at the behest of the Petroleum  
8 Administration for War, an agency that was developed  
9 specifically under executive orders at the behest of President  
05:01:58 10 Roosevelt to centralize and help us develop the avgas capacity.

11 I would like to point out to you, your Honor, the  
12 three key points that we think are important from the  
13 perspective of the PAW controlling the avgas industry.

14 First, it's very clear in the documentation that  
05:02:13 15 PAW treated the refinery industry in the United States as one  
16 unit. They did this -- the PAW was run, albeit --

17 THE COURT: It's all laid out in what Judge Fletcher  
18 describes.

19 MR. STEINWAY: Sorry, your Honor.

05:02:29 20 THE COURT: No, I'm not being critical. I just want  
21 to be sure that we get to the points that I think are more  
22 opaque.

23 MR. STEINWAY: Yes, Judge. The point that's important  
24 to make is the PAW treated the refinery industry as one unit.  
05:02:41 25 They looked at it as components of one refinery rather than

1 separate refineries. They controlled -- the regulatory program  
2 was such that they made sure that this one unit operated  
3 effectively and efficiently.

4           The second key point is the PAW had a wide range  
05:03:01 5 of very significant authorities. They had regulatory  
6 authorities and coercive authorities. The regulatory  
7 authorities -- as we cite in our papers, your Honor, there were  
8 two fundamental regulatory authorities that the PAW had. They  
9 were embodied in Recommendation Number 8 and Recommendation  
05:03:20 10 Number 16.

11           Later on, these recommendations actually were  
12 transferred and called by the PAW Directives. Directive Number  
13 8 was a directive that required the industry only to use octane  
14 enhancers for military purposes for avgas. That's Directive  
05:03:40 15 Number 8.

16           Directive Number 16 was a far-reaching directive  
17 that, essentially, covered the broad range of petroleum use  
18 throughout the country, from producing -- from drilling for oil  
19 to manufacturing avgas; to allocation of crude oil supplies; to  
05:04:03 20 transport, shipment, and sale of avgas and crude oil. That was  
21 covered by Directive Number 16. These directives were far, far  
22 greater than anything that was ever implemented during a peace  
23 time period.

24           At the same time, another set of regulatory  
05:04:22 25 authorities that the PAW had were coercive in nature. There

1 were two types of regulatory authorities along those lines. The  
2 first -- the first are --

05:04:40

3 THE COURT: I understand about these coercive  
4 measures. But my understanding is also that certainly there  
5 were no seizures in this case -- plant seizures, correct?

6 MR. STEINWAY: Your Honor, there was one plant seizure  
7 that we feel was important to bring to your attention.

8 THE COURT: Of Baytown properties?

05:04:58

9 MR. STEINWAY: Not at Baytown. But at Ingleside which  
10 is another Humble facility owned by the same -- well, it was run  
11 by the same management group, Hines Baker, who was the president  
12 of Humble.

13 THE COURT: But it's none of the facilities that are  
14 at issue in this case?

05:05:08

15 MR. STEINWAY: Not at that --

05:05:22

16 THE COURT: And it's undisputed that everybody knew  
17 that those powers were out there; but as Judge Fletcher said in  
18 his opinion, it's also clear that by far the great majority of  
19 the production that occurred was done through contracts that  
20 were voluntarily assumed, private contractual arrangements with  
21 the government.

05:05:42

22 MR. STEINWAY: Your Honor, we would dispute the notion  
23 that they were voluntarily assumed because they were,  
24 essentially, required cooperation. If the government didn't get  
25 -- if the companies had not entered into those contracts,

1 clearly --

2 THE COURT: Everybody knew -- I don't mean to  
3 interrupt you. But everybody knew those coercive powers were  
4 out there, and I will take as undisputed that there -- and it  
05:05:55 5 was already addressed in the materials you filed -- that there  
6 were some instances of seizure. And the one that you're talking  
7 about, obviously, would have been known to the party because it  
8 was the same party.

9 MR. STEINWAY: Yes.

05:06:07 10 THE COURT: That's the point you were looking for.  
11 What was the date of that seizure?

12 MR. STEINWAY: 1945. Twice in 1945.

13 THE COURT: But that's way after the contracts were  
14 entered into, right?

05:06:18 15 MR. STEINWAY: Yes, your Honor.

16 THE COURT: Okay. Keep going.

17 MR. STEINWAY: We would dispute, your Honor, the  
18 categorization that they were voluntarily assumed contracts.

19 THE COURT: They were contracts.

05:06:25 20 MR. STEINWAY: Yes.

21 THE COURT: They weren't seizures.

22 MR. STEINWAY: Yes, your Honor.

23 THE COURT: And nobody is arguing the legal defense of  
24 duress, right?

05:06:34 25 MR. STEINWAY: Yes, your Honor.

1 THE COURT: Okay.

2 MR. STEINWAY: The third -- the third point that we  
3 think is important from a PAW-controlled perspective to bring to  
4 your attention is, generally speaking, the record shows that the  
05:06:49 5 PAW was viewed as sort of a czar of octane enhancement.

6 They fundamentally controlled not only the crude  
7 oil supplies themselves but they dictated the processes and how  
8 the facilities themselves would be operated. Not only was 100  
9 octane a war product that was covered by the PAW's authorities,  
05:07:18 10 your Honor; but the PAW had virtual authority over a wide range  
11 of other war products.

12 And I'll just point out to you two other war  
13 products that were very significant that were developed as part  
14 of the PAW's authority. The first was 80 octane military  
05:07:35 15 gasoline. Just as 100 octane avgas was the warhorse for flying  
16 our airplanes faster, farther, and higher, AD octane military  
17 gasoline was the jack-of-all-trades, the power of the Army and  
18 land-based operations.

19 That is another war product that the government  
05:08:01 20 imposed requirements on Exxon and their predecessors to produce,  
21 and the other important war product to bring to your attention  
22 is Navy special fuel oil. That was the product that would power  
23 our ships that was required to be produced under the PAW's  
24 authorities.

05:08:22 25 We think, your Honor, that this issue of control

05:08:44

1 over the industry has already been established by Judge Kelleher  
2 in his opinion. In the Ninth Circuit in the Shell case dealing  
3 with the avgas industry, Judge Kelleher wrote "As a factual  
4 matter that the United States controlled the avgas industry  
5 during the war." That decision, albeit, was overturned by the  
6 Ninth Circuit on appeal; but none of his factual findings were  
7 disturbed.

05:09:02

8 In my view, your Honor, the Ninth Circuit  
9 decision was really more a legal technicality. It was a  
10 question of whether or not the United States should be  
11 considered an arranger and the Ninth Circuit ruled, well, the  
12 United States did not own and possess -- or possess the crude  
13 oil supplies that were processed at the Shell refinery.

05:09:21

14 So for that reason alone as a legal matter, the  
15 Ninth Circuit overturned the decision; but the Ninth Circuit did  
16 not at all disturb the factual findings that Judge Kelleher made  
17 at trial court level regarding the control.

05:09:40

18 In fact, your Honor, in the Ninth Circuit  
19 decision, again, the Ninth Circuit specifically affirmed in its  
20 -- in its findings that the United States substantially  
21 controlled the avgas industry during World War II and in the  
22 wartime period.

05:09:58

23 The Plancors are very important, your Honor,  
24 because they were sited right next to the refinery; and they  
25 were sited next to the refinery so that the whole complex could

1 be looked at as a war product manufacturing complex. They were  
2 not sited coincidentally. They were sited because of the  
3 integration between the Plancors and the refinery.

4           For example, the raw materials that went to power  
05:10:19 5 the butadiene Plancor plant or the butyl rubber Plancor plant or  
6 another government-owned facility called the Baytown Ordinance  
7 Works where 40 percent of the toluene manufactured during the  
8 war was manufactured at that nearby federal facility, those  
9 plants took advantage of the raw materials that were generated  
05:10:42 10 by the refinery and used as the power to make the toluene; and  
11 the naphtha, for example, that was generated as a byproduct from  
12 the refinery was transported over the short range over to the  
13 Baytown Ordinance Works and used to make the toluene that was  
14 used to make the TNT for explosives and other military  
05:11:03 15 applications.

16           In return, those Plancor facilities used to some  
17 extent the refinery wastewater systems to handle a number of the  
18 wastewaters that those Plancors themselves could not take. It  
19 was clear, your Honor, that during the war, these Plancor  
05:11:23 20 facilities were built very quickly and very hastily.

21           And the record -- the historical record says,  
22 your Honor, that those Plancors were built with minimal concern  
23 to waste consideration and waste handling capabilities. In my  
24 view, your Honor, I sort of categorize them as Model Ts. These  
05:11:50 25 were built as plants to make the material and there was a policy



1 that was codified by the Cadillac Fairview case in the Ninth  
2 Circuit that the -- there was a general policy that the Court  
3 recognized in the Ninth Circuit that scarce materials were  
4 devoted specifically to the construction of products, facilities  
05:12:08 5 to make products, and were not used to make waste handling or  
6 handle environmental pollution matters. We will go into this in  
7 great detail later on, as you know, your Honor.

8               So these Plancors were sited intentionally to  
9 make this all an integrated function. One of the disputes we  
05:12:32 10 have with the United States, your Honor, is over the Plancor,  
11 the hydrocodimer plant; and that plant, as we pointed out  
12 earlier in the demonstrative, was put right in the middle of the  
13 Baytown refinery.

14               The Baytown folks didn't want the refinery -- the  
05:12:48 15 Plancor there.

16               THE COURT: Why?

17               MR. STEINWAY: They didn't want it for two reasons:  
18 First, the plant was already over-congested; and by building  
19 this plant in the middle, they felt it would detract  
05:13:00 20 substantially from the efficiency of the overall refinery  
21 operations.

22               Second reason was they didn't want the  
23 hydrocodimer plant there because they didn't feel it would have  
24 any utility after the war. Hydrocodimer made, as I mentioned  
05:13:16 25 earlier, your Honor, codimer; and codimer was -- the codimer

1 octane enhancing practice was viewed as less efficient than the  
2 alkylate practice that Baytown already used.

3           So, the feeling of the Humble folks at the time,  
4 your Honor, was that we -- that they would not -- this plant  
05:13:36 5 would have very little utility after the war. There is a great  
6 debate between the United States and Exxon over whether or not  
7 Exxon voluntarily consented to build the plant.

8           Admittedly, the plant is there. Yes, we did --  
9 Humble did concede and build the plant; but we can tell you,  
05:13:57 10 your Honor, the record is replete with notations saying that  
11 Humble folks adamantly resisted and protested to the utmost; and  
12 in the end, yes, the plant was built there; but going back to  
13 the categorization of voluntary contracts, your Honor, I like  
14 the term "essentially required cooperation."

05:14:22 15           Required cooperation, that is, if we didn't do  
16 it, they would have seized the facility and make us do it. So,  
17 yes, there was a -- there's no doubt there was a patriotic  
18 aspect to everything that Humble did. Humble, Baton Rouge, and  
19 another facility, Marcus Hook, were the three biggest refineries  
05:14:39 20 in the United States; and if Humble and Baton Rouge did not make  
21 the avgas, we wouldn't have been able to fly the airplanes  
22 overseas. We knew we had to fly the airplanes overseas.

23           THE COURT: Is there any indication of any kind of  
24 threatened seizure or other action by the United States to  
05:14:57 25 require the construction of the Plancor?

1 MR. STEINWAY: It's my view, your Honor -- no, your  
2 Honor. It's my view, your Honor --

3 THE COURT: Your view was that everybody knew it was  
4 lurking out there?

05:15:06 5 MR. STEINWAY: There was a lot of -- in my view, your  
6 Honor, nasty correspondence, very strong correspondence in very  
7 military bureaucratic terms that we needed to build this; and  
8 the record is very clear, in our view, your Honor, that Humble  
9 did everything possible to show the United States the  
05:15:27 10 disadvantages of building that hydrocodimer plant there.

11 THE COURT: Okay.

12 MR. STEINWAY: So with that background, your Honor, I  
13 thought it would be helpful to lay out to you our legal  
14 underpinnings for operator control.

05:15:42 15 THE COURT: All right.

16 MR. STEINWAY: And --

17 THE COURT: Now you want me to turn to Tab 7?

18 MR. STEINWAY: I believe that's correct, your Honor.

19 Yes, your Honor.

05:15:57 20 There was no doubt that the Supreme Court in the  
21 Bestfoods case set forth the test for operator liability. By  
22 way of background, it might be useful to mention that the  
23 Bestfoods case came out of a situation dealing with corporate  
24 parent subsidiary liability.

05:16:16 25 THE COURT: I understand. I understand the Bestfoods

1 case, of course.

2 MR. STEINWAY: And in fact, your Honor, we have toyed  
3 with the concept that, perhaps, there should be a special rule  
4 for wartime cases and operator liability.

05:16:29 5 THE COURT: But there's not.

6 MR. STEINWAY: There's not, your Honor.

7 We feel that the case law suggests that there  
8 should be, and I will point out some of the recent cases where I  
9 think it's started -- well, where it has evolved.

05:16:46 10 THE COURT: Well, Congress is free to make any such  
11 rule any time Congress chooses, but Congress hasn't so chosen,  
12 right?

13 MR. STEINWAY: Yes, your Honor.

14 THE COURT: Is that a fair statement?

05:16:55 15 MR. STEINWAY: Yes, your Honor.

16 THE COURT: Okay.

17 MR. STEINWAY: Under the test of Bestfoods, if we look  
18 at the language of the test in dealing with the sentence where  
19 we're sharpening the definition for environmental purposes, the  
05:17:09 20 standard operator liability is that an operator must manage,  
21 direct, or control operations relating to pollution.

22 Here in this place, it's very clear. The  
23 manufacturing operations were the sources of the pollution.  
24 There's a direct nexus between the operations related to  
05:17:29 25 pollution in the Best -- Bestfoods and the operations that

1 caused the pollution here at Baytown.

2 We think that is the overriding test that needs  
3 to be made; and by example, Judge -- Associate Justice Souter in  
4 the decision points out a couple of examples, that is,  
05:17:49 5 operations having to do with waste disposal or environmental  
6 compliance.

7 We think those are examples of the fundamental  
8 overriding standard that operations causing pollutions would  
9 subject a party to operator liability under 107(a).

05:18:12 10 Here in this case -- and I would like to point  
11 out one of the other demonstratives, I think. In Demonstrative  
12 Number 7, your Honor --

13 THE COURT: Yes, sir. That's what I'm looking at.

14 MR. STEINWAY: -- the number four, it's very clear  
05:18:37 15 that the war demands caused a great deal of pressure on these  
16 refineries clearly resulting in an overtaxing of the waste  
17 handling resources of the facilities, both Baytown and Baton  
18 Rouge.

19 MR. BUTHOD: That's Tab 9, excuse me.

05:18:57 20 MR. STEINWAY: Oh, I'm sorry.

21 THE COURT: All right. Yes, I'm there.

22 MR. STEINWAY: I'm sorry, your Honor.

23 THE COURT: I got it. Thank you.

24 MR. STEINWAY: In Tab 9, if you don't mind taking a  
05:19:04 25 look at Number 4. We've highlighted that for you.

1 THE COURT: Yes.

2 MR. STEINWAY: And it says, "War activities caused a  
3 rampant expansion of plant facilities for production with no  
4 increase in waste disposal facilities. This has caused, as  
05:19:20 5 stated before, daily pollution of the Mississippi River."  
6 That's describing the Baton Rouge refinery, your Honor; but the  
7 same situation, obviously, resides with Baytown, as well.

8 So, the record, in our view, your Honor, is very  
9 clear. Operations did result in pollution. Let's take a look  
05:19:43 10 at even the examples that are set forth in the Bestfoods  
11 standard, whether or not waste disposal decisions were made.  
12 And the Government would have you look, your Honor, just at  
13 whether or not there were waste disposal decisions made and that  
14 would be the end of the story.

05:20:00 15 Well, there were waste disposal decisions made by  
16 the government; and for example, as you've mentioned, one of the  
17 clearest examples is the master separator. Here at the master  
18 separator, that was to be installed at the Callahan Bayou at  
19 Baton Rouge; but it's a very clear example of how a waste  
05:20:19 20 disposal decision was made at Baton Rouge.

21 At Baytown there were other waste disposal  
22 decisions made; and one that we pointed out deals with the acid  
23 burning facilities. Let's take for a moment a look at the  
24 master separator issue at Baton Rouge because that's a very good  
05:20:36 25 example.

1           The United States engineer, the predecessor to  
2 the Corps of Engineers, had said to Baton Rouge during the war  
3 we needed to install a master separator to address the  
4 increasing pollution problems emanating from the Baton Rouge  
05:20:54 5 facility. The problem was the War Production Board, the  
6 umbrella organization that oversaw the PAW activities, had  
7 authorities over steel, iron, and other scarce materials.

8           The War Production Board denied the construction  
9 of a master separator on the grounds that those materials should  
05:21:19 10 be used elsewhere and not for pollution saving purposes.  
11 Regardless of -- the point of the matter is the government made  
12 a decision -- they told us not to install the master separator  
13 and they made a decision about waste disposal.

14           There are other repeated denials of other waste  
05:21:42 15 handling equipment that were made by Exxon and their  
16 predecessors; but that is a very good example. In fact, I would  
17 submit, your Honor, that that example of denial of the master  
18 separator not only is a very good example of waste disposal but  
19 of a decision regarding compliance with environmental

05:22:02 20 requirements, the other prong of the Bestfoods standard, because  
21 the Army engineer had alleged that Baton Rouge was violating  
22 Section 7 of the Rivers and Harbors Act of 1899 and that if they  
23 did not stop discharging into the Mississippi River, the Army  
24 Engineer -- the Army Corps of Engineers, the regulatory  
05:22:24 25 authority at the time, would have brought an enforcement action

1 against Baton Rouge for non-compliance with the Rivers and  
2 Harbors Act.

3 But having discussed this with the War Production  
4 Board and with the PAW, they decided not to continue on with  
05:22:41 5 their enforcement action. So we maintain, your Honor, that that  
6 example not only shows a waste disposal decision made by the  
7 United States but actually a decision relating to environmental  
8 compliance issues, the other prong that's pointed out in the  
9 Bestfoods standard under the case.

05:23:01 10 At the same time, I've mentioned --

11 THE COURT: Is there any example of anything like that  
12 occurring at Baytown?

13 MR. STEINWAY: The closest example, your Honor, is the  
14 acid burning facilities where Exxon or Humble wanted to burn --  
05:23:17 15 to construct an acid burning facility to handle the sludge that  
16 is generated from avgas production; and they needed to build  
17 this facility, albeit as an interim step, while they were  
18 building some new acid concentration facilities; but again, the  
19 government denied Exxon's request to build the acid burning  
05:23:40 20 facility.

21 THE COURT: And what was the year?

22 MR. STEINWAY: 1943, your Honor, I believe. I may be  
23 off a year or two. It may be '42.

24 THE COURT: All right.

05:23:49 25 MR. STEINWAY: I'm not hundred percent positive.



1 THE COURT: I do have a question about the Baton Rouge  
2 facility and the decision you've been talking about with respect  
3 to that facility, and that is, the Government points out in its  
4 responsive arguments on this point that after the war ended  
05:24:09 5 Exxon didn't do anything to build this separator that had been  
6 refused during the war until the -- sometime in the 1950s.

7 And the Government points out that that delay  
8 suggests that the decision on whether to build it was not one  
9 that Exxon was -- had forced upon it. And certainly, Exxon did  
05:24:33 10 not rush to build it as soon as the restrictions on its ability  
11 to do so, the government-imposed restrictions, were lifted.

12 How do you respond to that?

13 MR. STEINWAY: Your Honor, first point is the master  
14 separator was proposed at two times during World War II. The  
05:24:51 15 first time was during the earlier part of the war. And so the  
16 master separator was proposed and advocated by Baton Rouge on  
17 several occasions.

18 As a practical matter, yes, indeed, it was built  
19 after the war; yes, indeed, it was built after restrictions were  
05:25:14 20 lifted. But it did take several years to construct this plant.  
21 We've tried to do a timeline, your Honor, of how much time it  
22 takes to go through process, design, feasibility study analysis  
23 to build a major unit. And this was a very major capital  
24 expenditure.

05:25:34 25 And so it did take a lot of time to build it, but

1 the fact of the matter is that there was a lot of talk during  
2 the war, and Exxon wanted to build this during the war, and it  
3 was denied by the PAW and the War Production Board.

05:25:52 4 MR. BUTHOD: Could I briefly -- Judge, could I address  
5 the Court's prior question? The Court was asking about whether  
6 there is a parallel example, if you will --

7 THE COURT: Yes.

8 MR. BUTHOD: -- from Beaumont as opposed to Baytown.

9 THE COURT: Right.

05:26:00 10 MR. BUTHOD: Or pardon me, Baytown as opposed to Baton  
11 Rouge. I would submit, Judge, in a sense I think the Government  
12 is being too granular with what the suggestion is about the  
13 standard for Bestfoods. I think the Fifth Circuit agrees with  
14 that.

05:26:12 15 If you look at what the Fifth Circuit said in  
16 Geraghty & Miller and if you look at the discussion of Bestfoods  
17 itself where the Court says "The definition of operator must be  
18 more than just a mechanical activation of promise and values" --

19 THE COURT: I understand.

05:26:26 20 MR. BUTHOD: -- it includes the exercise of  
21 direction --

22 THE COURT: No, I understand that, too.

23 MR. BUTHOD: -- or activity.

24 And the same way with Geraghty & Miller, they  
05:26:31 25 talk about a nexus and control over the facility operation and

1 not some narrow description of control over specific waste  
2 control operation. I mean, it's a --

3 THE COURT: To oversimplify the arguments, you guys  
4 are accusing the Government of being too granular and insisting  
05:26:53 5 on something amounting to physical operation. The Government is  
6 accusing you of being too global and generalized and jumping  
7 from the undeniable characterization that the Government had  
8 certain powers under the war regulations and it exercised them  
9 and it made certain directives that -- either through contract  
05:27:21 10 or other incentives were required to be followed.

11 And the Government is accusing Exxon of moving  
12 from those facts to the proposition that specific facilities  
13 were, therefore, operated by the government; and there's -- I  
14 mean, I think those are the bookends of the positions.

05:27:46 15 MR. BUTHOD: Understood. I would just submit,  
16 Judge, that that --

17 THE COURT: The battle is over where the details  
18 disclosing the factual records lead us to land.

19 MR. BUTHOD: And to be clear, we satisfy Bestfoods.  
05:27:58 20 We talk about it's a different relationship between a parent and  
21 a sub --

22 THE COURT: No, I understand.

23 MR. BUTHOD: -- and between the government and an oil  
24 company during the war.

05:28:03 25 THE COURT: Right. And I don't know how much you

1 intend to press your agency theory here. I have to say that I  
2 found that a stretch.

3 MR. BUTHOD: I don't think it necessarily requires an  
4 agency finding.

05:28:14 5 THE COURT: I'm not saying it does. I'm not saying it  
6 does. You asserted that as a separate ground for anchoring  
7 liability findings.

8 MR. BUTHOD: The language I keep harping back to,  
9 Judge, is what the Fifth Circuit tells us in Geraghty & Miller  
05:28:27 10 about a nexus between the control and the pollution of the  
11 facility.

12 THE COURT: I understand your arguments, I think, but  
13 at least the generalized ones. I'm working on trying to get my  
14 arms around the details.

05:28:40 15 MR. STEINWAY: Your Honor, there's other language in  
16 the Bestfoods case that talks about what is necessary to satisfy  
17 the operator standard; and this may go to your question about  
18 granularity. The Court discusses that all you need to do is  
19 show it from an organizational sense.

05:28:55 20 The Court -- the Supreme Court went to great  
21 lengths to say this does not mean that one has to turn the  
22 valves, shovel the dirt, or have a permanently stationed  
23 employee there full time.

24 Rather, the Court talks about the Bestfoods  
05:29:11 25 standard from looking at it from an organizational business

1 sense, an overriding umbrella sense. And so the test is really  
2 more did the government -- or was there direction and management  
3 in conducting of affairs and for more a policy level than from a  
4 granular digging the dirt, stationing employees' perspective.

05:29:40

5 One other point that we think is important to  
6 note about the Supreme Court case in Bestfoods is the case was  
7 remanded back down for further deliberations; and the reason it  
8 was remanded back down was there was a gentleman named  
9 Mr. Williams. And Mr. Williams was viewed as a parent -- he was

05:30:00

10 a parent employee who was dictating some policy guidance back  
11 down to the wholly-owned subsidiary, albeit, the Bestfoods case  
12 was in the corporate parent/subsidiary context.

05:30:24

13 But the point was that the Supreme Court said  
14 this kind of eccentric behavior could be the kind of eccentric  
15 behavior that would trigger operational control responsibility.  
16 And I would analogize that to the government's regulatory  
17 program during the war. That government regulatory program was  
18 the -- was, obviously, enormously important. We needed to win  
19 the war. All bets were off, whatever needed to be done.

05:30:46

20 That is about the most eccentric behavior when a  
21 country's security is threatened the next day that one could  
22 imagine. So I would analogize to the Supreme Court's concern  
23 about eccentric behavior. With respect to Mr. Williams, the  
24 eccentric behavior of creating the PAW, imposing these far  
25 greater regulatory requirements that were never imposed during

05:31:08

1 the peace time as another example of eccentric behavior that the  
2 Supreme Court might view as the kind of behavior that would  
3 trigger operational control responsibility.

4           The second key legal point that we'd like to  
05:31:26 5 bring to the Court's attention is the fundamental concept and  
6 CERCLA jurisprudence that in order to determine liability -- in  
7 order to determine CERCLA liability, you must look at the  
8 totality of the circumstances.

9           And there, the Court in our view, your Honor,  
05:31:49 10 establishes a level of CERCLA evidentiary requirements that is,  
11 perhaps, somewhat different than other civil matters. In fact,  
12 in the Tenth Circuit in the Tosco case, the Court said, "CERCLA  
13 liability may be inferred from the totality of the  
14 circumstances. It need not be proven by written evidence."

05:32:11 15           In fact, in that case, your Honor, a wealth of  
16 circumstantial evidence would be sufficient to allow for the  
17 consideration of the totality of the circumstances. And so, we  
18 think that's an important facet to your evaluation of operator  
19 liability.

05:32:28 20           I would like to point out two other important  
21 legal points on this operator control issue. Turning to your  
22 comment about no wartime special rule case, we think, your  
23 Honor, that there is a new special rule for governmental  
24 responsibility as operators; and that's embodied in the Township  
05:32:54 25 of Brighton case, the Sixth Circuit case.

1 In that case, your Honor, the Sixth Circuit ruled  
2 that a governmental entity, federal, state, or local entity, who  
3 extensively regulates a facility can be subject to operator  
4 liability.

05:33:13 5 It is a post-Bestfoods case so -- in fact, that  
6 case cites Bestfoods in coming to its -- in rendering its  
7 decision. But in that case, the Court said if a governmental  
8 entity is extensively regulating a facility, i.e.,  
9 macro-managing that facility, that governmental entity should be  
05:33:39 10 subject to CERCLA operator liability.

11 In fact, Justice Moore -- Judge -- Justice Moore  
12 in her concurring opinion differentiates between the police  
13 powers that a local entity or local sovereign may have and the  
14 level of regulatory control that would be sufficient to trigger  
05:34:01 15 CERCLA operator liability.

16 And here, we submit, your Honor, that extensive  
17 regulation is clearly the case. You had the PAW imposing again,  
18 as I mentioned, Recommendation Number 8, Recommendation Number  
19 16. In fact, overall, the PAW had 80 directives that they  
05:34:21 20 imposed on industry during -- on the avgas industry during World  
21 War II.

22 Certainly, that should be sufficient to suggest  
23 extensive regulation and to satisfy the Brighton test for  
24 operator liability in the context of governmental entities and  
05:34:41 25 their involvement in facilities.

1                   What we think is very interesting is what we  
2 point to in our papers, your Honor, about what we call the 50  
3 codimer example. What we mean by that was there was an instance  
4 during the war at Baytown where the thought was, given that  
05:35:03 5 since refineries are so complex and if you modify one little  
6 tilt of the oven it will generate a whole new stream of products  
7 on the output, there was thought given by Humble to change the  
8 output of the refinery to restrict -- to cut back 50 barrels per  
9 day of codimer.

05:35:26 10                   Humble was very concerned that if they kept on  
11 making this codimer, one of the byproducts that naturally comes  
12 out is residual fuel oil. Now, Humble was running out of  
13 capacity to store residual fuel oil. So they were worried "If  
14 we keep on making codimer, we're not going to have a place to  
05:35:45 15 put the residual fuel oil anymore."

16                   So when the government -- when this was broached  
17 to the government, the government said, "We don't care that  
18 you're only making 50 barrels per day more of codimer. We want  
19 you to make as much codimer as you possibly can; and if you make  
05:36:04 20 a lot more residual fuel oil, we'll find a place to put it."

21                   So that's a very good example of the government  
22 involvement in macro-managing the facility.

23                   THE COURT: What is macro-managing? Give me a  
24 definition. I can find a definition of micro-managing. But  
05:36:23 25 what is macro-managing --



1 MR. STEINWAY: I believe, your Honor --

2 THE COURT: -- and what's the relationship of  
3 macro-managing to operator and where will I find that?

4 MR. STEINWAY: Well, I think the term is used in the  
05:36:36 5 Brighton case so I think --

6 THE COURT: I know. I know. And without explanation  
7 or definition that I could really make a whole lot of  
8 generalizable sense out of. So it's a nifty little term. It's  
9 cute. But what does it mean?

05:36:51 10 MR. STEINWAY: It means substantial control. I think  
11 macro-managing --

12 THE COURT: What's the difference between -- I mean,  
13 micro-managing means substantial control. What's the -- is this  
14 less substantial but still substantial control? Is it  
05:37:04 15 substantial but not detailed? Is it -- I mean what -- orient me  
16 here.

17 MR. STEINWAY: I think, your Honor, macro-managing is  
18 more going to the question of granularity. I think the Court in  
19 Brighton recognized that macro-managing means at the policy  
05:37:19 20 level, at the business management level. You are dictating --  
21 you are conducting managing affairs of the company.

22 I think macro-managing goes more to the affairs  
23 of the company. Micro-managing goes more to actually who's  
24 shoveling the dirt, who is digging the trench, how many people  
05:37:37 25 you have there? To me, macro-managing --

1 THE COURT: So macro-managing is what a CEO does?

2 MR. STEINWAY: Or in the governmental context imposing  
3 regulations such that the government has stepped in the shoes of  
4 a private enterprise.

05:37:57 5 THE COURT: What part of the private enterprise?

6 MR. STEINWAY: The business -- at the management  
7 level.

8 THE COURT: That's my question. Management of a  
9 facility like these is complicated. And so then -- and it's  
05:38:18 10 management of the entire company, management of the facility,  
11 management of the pollution control of the facility? I mean,  
12 you got to keep going down. So where does macro-managing in the  
13 sense of overall policy setting, where does that lead you to  
14 conclude that specific decisions affecting pollution management  
05:38:46 15 and control at particular facilities at particular times are  
16 being assumed by this regulating agency?

17 MR. BUTHOD: I guess --

18 THE COURT: That's what I'm trying to figure out.

19 MR. BUTHOD: I understand the question, Judge. I  
05:39:00 20 guess the way I would submit it is as follows: If the  
21 government through the PAW is dictating input and output, here's  
22 what you need to make next year, here's where you're going to  
23 get your raw products --

24 THE COURT: Facility by facility?

05:39:14 25 MR. BUTHOD: By facility, by refinery, or by the

1 complex in Baytown. -- then they don't have to manage pollution  
2 controls at the facility. Well, that would be -- again, to take  
3 the Brighton terminology, that would be micro-managing. But  
4 dictating price, input/output, this is what we expect this  
05:39:26 5 refinery to do next year, it no longer has a corporate free will  
6 of its products.

7 THE COURT: But wait. I understand that there is  
8 specific instances you point to where that directly -- where  
9 those allocation decisions, if you will, directly impacted the  
05:39:48 10 ability to put specific controls in place; and the most clear  
11 example of that is at Baton Rouge and the separator; and we  
12 talked about that a little bit. But I'm still struggling with  
13 this step from here are the amounts, here's the price, here's  
14 your customers, on the one hand, and here are the specific  
05:40:22 15 choices you must make as the owner of the facility to achieve  
16 those goals. You know, clearly, those specific decisions amount  
17 to operating that can affect pollution directly.

18 But what you're telling me is that without making  
19 those decisions by simply setting the "Here's the output, here's  
05:40:53 20 the price, here's the customers," that so directly affects the  
21 choice of resource allocation that you don't have to exercise  
22 more granular powers to be an operator.

23 MR. BUTHOD: Absolutely. I think that's the nexus  
24 between -- a nexus between --

05:41:10 25 THE COURT: But I guess that -- but you know, that's

1 what I'm struggling with because it seems to me to be a huge  
2 gap. I mean, if all Humble did at the Baytown facility was to  
3 send out a list to pass out to its unit heads, the guy who runs  
4 each of the operating units within the plant, within the  
05:41:40 5 refinery, and said, "Here's our requirements and the limits on  
6 what we can charge and who we can sell to. Go do it," nothing  
7 would happen.

8 I mean, that's not specific direction of choices  
9 to be made to comply with those goals and limits. So what I'm  
05:42:06 10 trying to grasp is what the government does beyond saying,  
11 "Here's how much you got to make. Here's the price limit on  
12 what you can charge and here's who we want you to sell it to,"  
13 what the -- whether that is sufficient for operation -- for  
14 operator when it seems to me that there's a big gap of specific  
05:42:34 15 directive steps and choices that have to be made at a more  
16 granular level to operate.

17 MR. BUTHOD: Absolutely. I guess that's where we come  
18 into the notion that I don't think --

19 THE COURT: So you think they both are operator  
05:42:51 20 functions?

21 MR. BUTHOD: The Fifth Circuit talks about  
22 macro-management. The Fifth Circuit talks about nexus of  
23 control of the operation.

24 THE COURT: Right.

05:42:58 25 MR. BUTHOD: Frankly, Judge, this may be unhelpful to

1 anyone else in this room but I think of it by rough, rough  
2 analogy, it's like a concept of field preemption. During the  
3 wartime --

05:43:10 4 THE COURT: Oh, that's so unclear by itself, an  
5 unclear doctrine to make something confusing more confusing.

6 MR. BUTHOD: Fair enough. But just the notion that  
7 during the wartime because the manufacture of avgas and the  
8 enormous commitment required by the refineries, yes, I think  
9 Judge Kelleher had it right and I think the Ninth Circuit, Judge  
05:43:26 10 Fletcher, had it right, irrespective of whether it was an  
11 arranger just because the waste was disposed of off-site.

12 They had it right in discussing that that control  
13 was -- and I won't say the analogy -- was effectively the  
14 government operating the industry of the manufacture of avgas,  
05:43:44 15 and it doesn't require a valve turning or a decision about a  
16 master --

17 THE COURT: No, I understand that. But I don't think  
18 the Government is, in fairness to the Government, taking the  
19 position that government employees had to be out there at the  
05:43:58 20 plant checking the valves, turning on the -- turning the  
21 handles, priming the pumps. I don't think the Government's  
22 taking that position.

23 I think the Government and you are both  
24 struggling with this -- with having to put flesh on the  
05:44:19 25 macro-managing bones, and I understand that there can be

1 different levels of operator and there can be more than one  
2 operator. And to some extent, what you are saying is that they  
3 were an operator but we, of course, were, too; and that's really  
4 where we're all trying to -- and we've already in a sense moved  
05:44:42 5 to allocation.

6 MR. BUTHOD: And the only thing I would add --

7 THE COURT: Am I right?

8 MR. BUTHOD: Yes. I think the only thing I would add  
9 to what the Court just said is we're also struggling because,  
05:44:53 10 remember, if we are pressed for specific examples, everyone in  
11 this room is limited by what the National Archives happens to  
12 still retain from what was taking place in 1943. So it becomes  
13 kind of --

14 THE COURT: Welcome to the world of law. We're always  
05:45:05 15 limited by the facts that we have evidence available to prove.  
16 This is complicated because we're looking so far back in time.

17 MR. BUTHOD: Agreed.

18 THE COURT: That's all.

19 MR. BUTHOD: That's why I think details at some point  
05:45:14 20 become unhelpful to say, "Oh, I need to see more letters like  
21 this," et cetera, et cetera.

22 MR. STEINWAY: Your Honor --

23 THE COURT: You know, I got to say you don't have a  
24 lot of live witnesses who have clear memories of what happened.  
05:45:26 25 That, I get.

1 MR. STEINWAY: I understand.

2 THE COURT: But these people were great record  
3 keepers, great record -- they were great record generators. And  
4 I'm not persuaded by this notion that there was a wholesale loss  
05:45:42 5 of important papers.

6 MR. BUTHOD: No.

7 THE COURT: I think we got lots and lots and lots of  
8 documents as evidenced by the huge amount of materials that your  
9 expert historians were able to access and spent lots of your  
05:45:59 10 client's money to explain to me. I don't really -- I'm not  
11 persuaded by the explanation that the absence of examples is due  
12 to the lack of presently available information that might have  
13 been available at an earlier time. I don't think that that's  
14 sufficient.

05:46:23 15 MR. STEINWAY: Your Honor, to put a little more flesh  
16 on the bones, as you mentioned, in terms of the macro-managing  
17 issue, the regulatory programs we've been talking about are  
18 really just the tip of the iceberg. There are a lot of  
19 additional things that happened to evidence the government's  
05:46:40 20 control. Let me point out a couple more to you.

21 THE COURT: Okay. Are we back in Baytown now?

22 MR. STEINWAY: Yes, ma'am.

23 THE COURT: Okay.

24 MR. STEINWAY: First one is the planned blending  
05:46:48 25 programming. Albeit, you've mentioned a lot about price

1 direction; but all these facilities were now subject to what the  
2 PAW has called the planned blending program. Every month these  
3 facilities were required to submit monthly and daily reports,  
4 tell the government what they planned to do, what -- what  
5 they're going to do in response to the government dictates.

6 The government would tell them, "Okay. Here's  
7 every little piece of the puzzle that we want you to use as part  
8 of the planned blending program." They implemented this by  
9 telegrams, and we pointed out a number of these telegrams, your  
10 Honor, were on a daily basis to implement the requirements of  
11 these regulations.

12 The government would on a moment's notice send a  
13 telegram to Baytown or Baton Rouge saying, "Change your product  
14 mix. Now we want you to make more 80 octane gasoline. We don't  
15 want you to make Navy special fuel oil anymore." So there was  
16 constant every day, not -- a substantial number of telegrams.  
17 To compound that, there were inspections by the government. The  
18 government would send cadres of engineers down to facilities to  
19 specifically change the makeup of those facilities. They would  
20 come in to troubleshoot our production, that those engineers  
21 didn't like --

22 THE COURT: The Government responded that this was to  
23 ensure compliance with standards and contractual -- with broad  
24 contractual requirements and points to case law saying that that  
25 kind of monitoring for quality or standard compliance is not



1 adequate to confer operator status.

2 MR. STEINWAY: And your Honor, the example that the  
3 Government gives, coincidentally, is the example of an  
4 inspection a month after the war when certainly --

05:48:46

5 THE COURT: No, I understand that. But what about  
6 their point that to the extent the contract gave the government  
7 the authority to have those kinds of inspections -- and we all  
8 know that they're common in refinery contracts and I assume were  
9 then.

05:49:04

10 But let's assume the authority was exercised,  
11 that they came in and inspected to be sure that compliance with  
12 quality control was maintained and with -- output requirements  
13 were maintained. Is that sufficient for operator status?

05:49:27

14 MR. STEINWAY: In our view, your Honor, from the FMC  
15 criterion -- we haven't talked about the FMC case yet. But yes,  
16 indeed, that was one of the compelling factors in the Court's  
17 decision in FMC in the Third Circuit.

05:49:41

18 THE COURT: Well, here again, we have a continuum --  
19 and I'm familiar with the case, of course; but we have a  
20 continuum between the plants where the government had personnel  
21 present for permanent or extended periods, present and  
22 exercising significant authority. So we got that on the one  
23 hand.

05:50:00

24 And then we've got -- not at the Baytown  
25 refinery. And then we have more sporadic parachutings in

05:50:34

1 inspection and departure. Somewhere clearly having personnel on  
2 site with continuing oversight responsibility and authority is a  
3 more persuasive case for indicia of operator authority that was  
4 being exercised than some periodic parachute in and then inspect  
5 and depart.

6 So are you telling me that the parachuting  
7 approach is as much a factor in -- or as persuasive a factor in  
8 finding operator status as a more permanent presence and  
9 oversight authority?

05:50:55

10 MR. STEINWAY: Your Honor, at the Plancors, there were  
11 governmental officials stationed permanently.

12 THE COURT: I understand that.

13 MR. STEINWAY: And at the Baytown Ordinance Works  
14 where they made the toluene --

05:51:04

15 THE COURT: Right.

16 MR. STEINWAY: -- it was treated more like a fort.

17 THE COURT: You're talking about BOW. I like that.

05:51:20

18 MR. STEINWAY: But I think you need to look at it,  
19 your Honor, in terms of the overall indicia control; and the  
20 best case that's really quantified this issue is the FMC case.  
21 In the FMC case, the Court found substantial control and how  
22 much -- I think some of the questions you're asking, your Honor,  
23 with all due respect are questions how much is necessary to  
24 trigger this operational control.

05:51:36

25 THE COURT: You know, judges hate it when you say

1 "with all due respect."

2 MR. STEINWAY: I'm sorry.

3 THE COURT: We hate it because, you know, we know what  
4 it means. Keep going.

05:51:46 5 MR. STEINWAY: In the FMC case, the Third Circuit said  
6 that there were four basic indicia of control when the  
7 government told them what product to make, the level of  
8 production, to whom the product should be sold, and the price;  
9 and we can talk about the six cents per cost of profit that  
05:52:09 10 Exxon got. But those were the four basic indicia of control.

11 And where we strongly disagree with the  
12 Government is the Government says that FMC is an outlier after  
13 Bestfoods. And that's very far from the case.

14 THE COURT: Well, I understand your legal arguments  
05:52:26 15 here, but I think I'm asking a slightly different question now,  
16 and I understand your argument that FMC supports the position  
17 that if the government did nothing other than set these output,  
18 price, and customer designation requirements, that would be  
19 enough. But you're also telling me -- that's what I hear you  
05:52:48 20 just said.

21 MR. STEINWAY: Yes, your Honor.

22 THE COURT: But you're also telling me that this  
23 inspection authority added to those basic indicia of control  
24 cements the deal.

05:53:02 25 MR. STEINWAY: We have more, your Honor. Not only the

1 inspection authority but the fact that the government decided to  
2 site the Plancors adjacent to the refinery and added -- changed  
3 the makeup of these facilities --

05:53:19 4 THE COURT: Tell me what the inspection authority  
5 does. Where's the nexus between that and pollution?

6 MR. STEINWAY: The inspectors were often sent in --  
7 the records show the inspectors were often sent in to,  
8 basically, troubleshoot if there was a problem in making the  
9 particular octane enhancer or the mix between the base stock and  
05:53:42 10 the octane enhancer was off. Where there was too much octane  
11 enhancer and not enough base stock, the production engineers  
12 would come in and mess and twiddle with the refinery processes  
13 to try to put it back in balance. If there was a breakdown in  
14 the piping system, the inspectors came in on a periodic basis,  
05:54:16 15 basically, for production troubleshooting.

16 THE COURT: I understand that. But again, the nexus  
17 to pollution, what you're saying is that -- sort of other than  
18 the kind of argument that says it's all connected and the shin  
19 bone is connected to the knee bone connected to the thigh bone,  
05:54:35 20 I'm looking for a more particularized nexus here. Where in the  
21 record am I going to find that? It's a big record, I know.

22 MR. STEINWAY: Well, in some respects, relating to  
23 pollution is also modified by having to do with waste disposal;  
24 and in our view, your Honor, all manufacturing operations have  
05:55:01 25 something to do with waste disposal.

1 THE COURT: So we're, basically, arguing that the shin  
2 bone is connected to the knee is connected to the thigh bone,  
3 that is, everything has to do with everything?

4 MR. BUTHOD: I think it's a little stronger than that,  
05:55:14 5 Judge, because the Fifth Circuit says control over the activity  
6 causing pollution.

7 THE COURT: So every activity in these plants in some  
8 way causes pollution?

9 MR. BUTHOD: The significantly --

05:55:25 10 THE COURT: The manufacturing?

11 MR. BUTHOD: -- the enormously increased manufacture  
12 of avgas --

13 THE COURT: Uh-huh.

14 MR. BUTHOD: -- which is not what the plant's  
05:55:32 15 originally designed to do --

16 THE COURT: That's a fair point.

17 MR. BUTHOD: -- absolutely caused pollution. That is  
18 absolutely the case.

19 THE COURT: In every aspect of the refinery  
05:55:40 20 processing --

21 MR. STEINWAY: It overtaxed the system.

22 MR. BUTHOD: And that is, the nexus, if you want to  
23 look at Geraghty Miller or control over the activity causing  
24 pollution.

05:55:50 25 THE COURT: All right.

1 All right, go ahead.

2 MR. STEINWAY: Your Honor, just to close --

3 THE COURT: I take your point.

4 MR. STEINWAY: -- on the operator refinery issue --

05:56:00 5 THE COURT: Yes.

6 MR. STEINWAY: -- the Government has pointed out a  
7 number of examples of cases where they were not held to be  
8 responsible as an operator.

9 And to sort of generalize those cases, they're  
05:56:17 10 cases where the government had a quality control person at the  
11 back end of the production line or in the Litgo case dealing  
12 with Columbia aircraft and the government was regulating TCE and  
13 the government there was not held responsible as an operator.

14 This situation is far different than those  
05:56:40 15 situations. This is not a situation where the government was a  
16 mere interested consumer. The government worked all the way up  
17 the chain in the operator control issues. They were not just at  
18 the back end looking at quality control. They were on the front  
19 end with raw materials, raw supplies, production quotas, coming  
05:57:02 20 in -- making waste disposal decisions throughout the chain of a  
21 manufacturing process.

22 So we think all the cases that the government has  
23 cited for propositions that they were not liable as an operator  
24 don't anywhere approach the situation we have here at Baytown.

05:57:18 25 THE COURT: All right. So now is it appropriate for

1 me to hear responsive argument from the Government on these  
2 points?

3 MR. STEINWAY: Your Honor, we have not talked about  
4 operator liability with respect to the Plancors but --

05:57:30

5 THE COURT: That's fine. I understand. But there's a  
6 different arrangement there. So keeping these distinctions  
7 before us, perhaps, it would be helpful at this point.

8 MR. ROWE: Your Honor, we're happy to do it either  
9 way. Our argument is actually organized by, I guess, legal  
10 topic, operator --

05:57:46

11 THE COURT REPORTER: I can't hear you.

12 MR. ROWE: We would be happy to let Exxon go ahead and  
13 finish, if they would like.

14 THE COURT: That's fine. That's fine.

05:57:55

15 Keep going.

16 MR. STEINWAY: Your Honor, with respect to the  
17 question of operator liability for the Plancors in holding the  
18 government responsible as an operator under 107(a)(2), the  
19 government has admitted that they are liable as an owner under  
20 107(a)(2) in the first place.

05:58:17

21 Now we'll turn to the question of operator  
22 responsibility. And there, your Honor, we submit that the  
23 operator responsibility is even greater than at the refinery  
24 level.

05:58:34

25 For the rubber industry -- these Plancors were

1 facilities used to construct components of rubber or rubber  
2 products. At Baytown, for example, there's a butyl rubber  
3 Plancor that is lower quality rubber than the butyl-S copolymer  
4 plant that is not the subject of the litigation but it is a  
05:58:58 5 rubber product. And the other Plancor is a butadiene Plancor;  
6 and basically, you combine butadiene with styrene to make a high  
7 quality rubber.

8 Both of those facilities were owned by the Rubber  
9 Reserve Company and that -- and they were part -- and the  
05:59:17 10 contracts were let by the Defense Plant Corporation. There was  
11 no rubber industry before these Plancors were built.

12 The United States faced the undaunting prospect  
13 of having to develop overnight a synthetic rubber industry when  
14 we knew the Japanese had controlled literally 90 percent of our  
05:59:38 15 rubber production overseas during World War II. We had no  
16 longer any access to natural rubber supplies. We had to create  
17 our own natural rubber industry.

18 And Exxon, albeit, was one of the leaders in  
19 converting petroleum byproducts into rubber goods. There were  
05:59:56 20 other ways to make rubber; but really, nobody had made rubber  
21 from petroleum byproducts before and Exxon and their  
22 predecessors were the first.

23 So in terms of creating an industry and  
24 controlling what's going on, this is the quintessential example  
06:00:13 25 of government control. They literally built this industry



1 overnight. Rubber, indeed, as we discussed earlier, your Honor,  
2 was one of the, perhaps, two most critical essential materials  
3 during World War II, avgas being the other, rubber being the  
4 other. That's why there were separate governmental agencies  
06:00:32 5 just regulating those specific products per se.

6           While you've mentioned your views on our agency  
7 argument earlier --

8           THE COURT: I'm just skeptical. I'm not ruling.  
9 Please don't misunderstand me. It seemed like a stretch.

06:00:53 10           MR. STEINWAY: Your Honor, I would like to point out  
11 to you -- and we have in the record -- and I'm going to mention  
12 this in a moment. This is a copy of the manual of  
13 administrative procedures.

14           THE COURT: Okay.

06:01:00 15           MR. STEINWAY: And in that manual, if you take a  
16 look -- we will concede, your Honor, that the word "agent" is  
17 not used in the operating agreements that govern the activities  
18 of the Baytown Plancors in contrast, for example, to the agency  
19 word that's used in the Dow plant -- in the Plancors for Dow in  
06:01:24 20 the Ninth Circuit.

21           However, as a practical matter, Humble was the  
22 agent of the United States and these documents show that. For  
23 example, if you take a look at the manual of administrative  
24 procedures that guided all of these Plancors and you turn to --  
06:01:40 25 I just picked one representative example of the -- this manual

1 is the manual that guided the operations of the Plancors at  
2 Baytown as well as Baton Rouge.

3           And the page number -- the Bates Stamp page  
4 number for the record is BAYC, four zeros, 9463. It's page 11,  
06:02:07 5 your Honor, of the manual; and I thought this is a very good  
6 representative example of the typical treatment -- or the  
7 typical categorization that the government viewed Humble in  
8 operating these Plancors.

9           It says here in discussing forms prescribed  
06:02:22 10 and/or approved by the Rubber Reserve Company in Section 501:  
11 "Operator shall use the form of purchase order prescribed on RUS  
12 Form 62 for all purchases which are made as agents for RRC." So  
13 while the word "agent" may not actually be in the contract per  
14 se, your Honor, Humble clearly held themselves out as the agent  
06:02:50 15 for the Rubber Reserve Company.

16           These documents specifically prescribe them to be  
17 the agent for the Rubber Reserve Company. In fact, there are  
18 documents known in the record where Humble held themselves out  
19 as the agent for these Plancors. When they were purchasing  
06:03:06 20 sewer pipe, when they were handling waste disposal activities at  
21 these Plancors, the term "agent" is used to describe the  
22 capacity of Humble or when Humble is shipping the rubber  
23 products from those Plancors or when Humble is purchasing the  
24 raw materials, naphtha, that is used for the Baytown Ordinance  
06:03:31 25 Works, in all those circumstances, your Honor, the record shows

1 that Humble was categorized as the agent of the government for  
2 purposes of conducting those activities.

3           We tried to lay out, your Honor, in these papers  
4 three criteria that we believe govern the agency relationship.  
06:03:48 5 Those criteria are as follows: one, that the parties consented  
6 to the situation that they were involved with. And that's  
7 certainly the case. We had an operating contract.

8           Second of all, the second criteria is the  
9 government controlled all of the activities. Well, certainly,  
06:04:07 10 the government controlled all the activities at the Plancors.  
11 They have this manual that's yay thick telling Humble how to  
12 conduct all kinds of activities from monthly and daily reports  
13 to purchasing equipment. Anything above a prescribed level had  
14 to get governmental approval as a matter of course to do  
06:04:27 15 anything at any of those Plancors. So certainly, the government  
16 controlled the activities.

17           And the final criteria for agency responsibility  
18 is that this activity was conducted entirely for the benefit of  
19 one party, here in this case, the Government.

06:04:43 20           THE COURT: What's your best case for transferring  
21 common law agency principles to this context?

22           MR. STEINWAY: Well, we've cited several cases in our  
23 papers, your Honor.

24           THE COURT: I know. What's your best case?

06:04:55 25           MR. STEINWAY: We feel this is our best case.

1 THE COURT: This -- okay.

2 MR. STEINWAY: I don't have the names readily at hand.

3 THE COURT: All right. All right. Well, perhaps,  
4 while the Government's putting their argument before me, you can  
06:05:14 5 take a look.

6 MR. STEINWAY: One other key facet about these  
7 contracts that we think support to bring to your attention is  
8 that all of the costs of waste disposal, all of these costs were  
9 borne by the government and added criteria to the agency  
06:05:30 10 relationship. It's almost equates -- in our view it almost  
11 equates to an indemnity because, here, the government agreed by  
12 contract to assume all of the costs and responsibilities for  
13 those operations.

14 So we think that's an added feature that adds  
06:05:47 15 emphasis to the agency argument. As a practical matter, the  
16 Courts have already ruled that the government is an operator in  
17 a Plancor situation. In the Ninth Circuit, Cadillac Fairview,  
18 at the Dow facility, the styrene facility, the Court ruled that  
19 Dow was an operator of a Plancor and subject to CERCLA 107(a) (2)  
06:06:10 20 liability.

21 Similarly, in FMC dealing with another Plancor, a  
22 government-owned facility, there in that case the government was  
23 viewed again as an operator of a government-owned Plancor  
24 facility. So we think the precedent has already been set by the  
06:06:27 25 Third Circuit and the Ninth Circuit.

1           Having said that, taking a look at the specific  
2 operational control factors that would influence your decision,  
3 your Honor, on operator control --

4           THE COURT: Yes, sir.

06:06:41

5           MR. STEINWAY: -- here again, all of those factors are  
6 satisfied if nothing more than even better than at the  
7 refineries because here the government controlled the product.

06:06:57

8           They said for sure that the only thing that could  
9 be made is butadiene or butyl rubber. The government set the  
10 production levels. The government set the pricing. And the  
11 government said, "Here's the market. Here's where you sit."

06:07:14

12           Admittedly, these were all in a contract.  
13 Admittedly, these were all in an operating contract. But the  
14 fact of the matter is that contract was a codification of the  
15 government's requirements. Essentially, the government said,  
16 "We're requiring your cooperation. We're requiring you do this.  
17 And yeah, if you need a contract as a matter of corporate  
18 formality, we'll enter into a contract as a matter of corporate  
19 formality" but the fact of the matter is the government would  
20 have instituted this regardless of whether or not they had a  
21 contract or not and they would have seized the facility as we  
22 discussed earlier, your Honor.

06:07:33

06:07:51

23           A couple of other key points to bring to your  
24 attention regarding the operational facets of these Plancors. I  
25 mentioned earlier all actions were -- all actions taken in any

1 of these Plancors had to be approved by the DPC, the  
2 governmental agency.

3 Now there were some instances where if the  
4 expenditures did not exceed some minimum threshold, there was  
06:08:09 5 not any governmental regulatory requirement for approval; but by  
6 and large, almost all substantial capital expenditures at these  
7 plants had to be subject and approved by the government; and  
8 there were instances where the government would deny these  
9 expenditures for various and sundry reasons.

06:08:27 10 So another key point that you've already  
11 mentioned, your Honor, is the stationing of employees at these  
12 facilities. And I'd like to just point out two examples for  
13 your consideration. One, at the Baytown Ordinance Works, which  
14 is where they manufactured the toluene there, there's  
06:08:48 15 documentation in the record which shows that the Humble folks  
16 were always concerned about getting routine daily orders from  
17 the ordinance department.

18 And they were always complaining about having --  
19 and the quote goes to having to send orders back to St. Louis in  
06:09:08 20 response to the Ordinance Works. It shows again a constant  
21 presence of the governmental employees at these facilities  
22 embarking on orders, directives, managing, conducting of  
23 facilities.

24 At the Baytown facility -- at the Baytown  
06:09:23 25 Plancor, for example, there was a permanently stationed

1 employee; and we've put in the record a quote: that the  
2 employee observed -- one day the employee was observing, as one  
3 example, private employees leaving work early. That's just one  
4 example of what -- we tried to use that as one example of  
06:09:46 5 government employees exercising some kind of supervisory  
6 capabilities over these Plancors.

7               What I think might even really go to the operator  
8 liability concern for these Plancors is two fundamental facts  
9 about waste disposal per se. The first point is the record is  
06:10:08 10 clear -- and we've discussed this earlier, your Honor -- that  
11 the Rubber Reserve Company built these facilities in a very  
12 hasty manner, as I mentioned earlier like a Model T.

13               And the government intentionally knew that they  
14 were building facilities that could not handle adequately the  
06:10:25 15 waste. And they knew that they were influencing waste disposal  
16 decisions, and it was a general policy during the war that  
17 saving people's lives was, obviously, more important than saving  
18 pollution.

19               The other key point about waste disposal I think  
06:10:43 20 is confirmed by the government's own auditor himself after the  
21 war. His name was Shepard Powell and we quote from him in our  
22 papers. Shepard Powell was commissioned by the Rubber Reserve  
23 Company after the war to conduct an audit of all these Plancors  
24 and to decide and determine what kind of recommendation should  
06:11:02 25 be made to improve the waste handling processes of these

1 facilities.

2 And during his audit of Baytown and Baton Rouge,  
3 Powell expressly mentioned all the deficiencies and problems  
4 that he foresaw and saw in running these Plancors. So we think  
06:11:21 5 here that's a very clear example of the government involved in  
6 waste disposal decisions and environmental compliance decisions  
7 are manifested by their directions and policies in building  
8 these Plancors in the first place.

9 We have not talked much about the Baytown  
06:11:38 10 Ordinance Works, and I'm just going to briefly mention this.

11 THE COURT: All right.

12 MR. STEINWAY: I mentioned earlier, your Honor, that  
13 the Ordinance Works was the facility that took naphtha and  
14 converted it into toluene. And 40 percent of the country's  
06:11:54 15 toluene was produced by the Baytown ordinance during the war and  
16 that was sent over to Ordinance Works to construct TNT.

17 I think that -- I think that there are two points  
18 that are worth mentioning there. And the first point is that  
19 the Baytown Ordinance Works -- and I think you mentioned this,  
06:12:17 20 your Honor -- almost operated more like a fort than like a  
21 chemical plant.

22 The plant was completely -- was completely  
23 involved with military folks, military personnel who were  
24 constantly at the plant. And so I think that shows an  
06:12:43 25 additional presence even beyond some of the fundamental FMC



1 indicia of control that we talked about earlier.

2 I thought it was interesting what Cadillac  
3 Fairview -- what the Court says in Cadillac Fairview about this  
4 in describing the role of Dow as an operator -- as a Plancor  
06:13:05 5 operator of the styrene plant. The Court in the Ninth Circuit  
6 said Dow's role was more nearly analogous to that of a soldier  
7 than that of a commercial sentence. And I think that really  
8 categorizes the nature of all these Plancors across the country  
9 that were involved in building rubber -- manufacturing rubber or  
06:13:24 10 rubber components.

11 The other key point about the Ordinance Works is  
12 the records showing very clearly a constant monitoring of the  
13 Ordinance Works, rightfully so, was toluene construction for  
14 explosives by the ordinance department; and there's substantial  
06:13:43 15 evidence to support that.

16 That sort of really covers in a nutshell our  
17 points on operator liability with respect to the Plancors.

18 THE COURT: All right. And at this point, I'm trying  
19 to figure out when the appropriate point is, given the  
06:13:59 20 government's somewhat different organization of its  
21 presentation, for the government to jump in.

22 MR. ROWE: Your Honor, I think -- I think I'm having  
23 trouble being heard. So let me do it this way.

24 THE COURT: That's very helpful. Thank you.

06:14:16 25 MR. ROWE: I'll apologize to the reporter who I'm

1 already being cruel to here.

2 I can tell you what we have and we can do it any  
3 way you would like. I don't expect to spend a lot of time  
4 talking about individual facts at this refinery or that  
06:14:29 5 refinery, at this Plancor or that Plancor. We will talk about  
6 them but not at that level of detail because it's really all  
7 about the operator theory and how it applies. And I'm going to  
8 try to keep that at a level of generality.

9 And there are a number of other issues that I  
06:14:42 10 will cover; and when I get up, I'll give you a who is going to  
11 do what kind of presentation. I would expect that I can do  
12 everything I have to say to you in 45 minutes to an hour, and I  
13 think Mr. Lynk probably has about a half hour. But it's not  
14 divided up Baytown/Baton Rouge.

06:15:02 15 THE COURT: Start talking. Start talking.

16 MR. ROWE: Would it be okay for us to take a short  
17 break before we start?

18 THE COURT: Sure, that's fine.

19 MR. ROWE: Five minutes.

20 THE COURT: Five minutes is great.

21 Is that all right with you, Gayle, or do you need  
22 more?

23 THE COURT REPORTER: If I could have ten, please? I  
24 have to make a couple of phone calls.

06:15:11 25 THE COURT: Ten minutes, please.

1 (Court recessed at 6:15 p.m.)

2 (Court resumed at 6:28 p.m.)

3 THE COURT: All right. Are you starting with  
4 operator?

06:29:08 5 MR. ROWE: Yes, your Honor. Actually, I'm starting  
6 with schedule because I'm afraid that I will forget this if I  
7 don't do it right now.

8 THE COURT: Okay.

9 MR. ROWE: I wanted to let the Court know we -- at the  
06:29:20 10 moment I think we have on the docket a final pretrial in the  
11 middle of April. The parties are agreed that that doesn't  
12 really fit --

13 THE COURT: No, I agree with that, too. I would --  
14 I'm going to just sort of suspend the deadlines until we get  
06:29:32 15 these resolved, these threshold issues.

16 MR. ROWE: That will be fine. We have also talked  
17 about an alternative schedule that might work.

18 THE COURT: All right.

19 MR. ROWE: If you would like to do it that way, that's  
06:29:40 20 fine.

21 THE COURT: I'll hear that as well. Are you going to  
22 submit that to me in writing?

23 MR. ROWE: We will once we -- we have a little more  
24 work to do on it.

06:29:45 25 THE COURT: That's fine.

1 MR. ROWE: There is one question about it that we  
2 wanted to ask. We just passed the deadline in March for -- I  
3 believe it's stated in the standard order "Motions other than  
4 motions in limine." And we were not clear --

06:30:00 5 THE COURT: You've already filed those with respect to  
6 the threshold issues.

7 MR. ROWE: So this --

8 THE COURT: You're fine.

9 MR. ROWE: Okay.

06:30:08 10 THE COURT: That's where you are. That's what we're  
11 arguing.

12 MR. ROWE: We do have a few other motions that we may  
13 put -- build into the schedule if and when we do it.

14 THE COURT: That's fine.

06:30:15 15 MR. ROWE: If we want to wait and see how this comes  
16 out, that's perfectly fine with the Government.

17 THE COURT: All right.

18 MR. ROWE: Okay. So I'm going to take only just a  
19 moment to do this, but it would be inappropriate for me not to  
06:30:25 20 recognize my colleagues on the telephone. They are Stephanie  
21 Talbert and Erica Zilioli. I suspect they're probably still  
22 listening.

23 THE COURT: I'm not sure.

24 MR. ROWE: Mr. Lynk -- I guess they're gluttons for  
06:30:39 25 punishment. Mr. Lynk and I are very much standing on their

1 shoulders doing this argument. Certainly, I am.

2 THE COURT: Yeah. Both sides did very, very fine and  
3 thorough briefing. I appreciate it very much.

4 MR. ROWE: Thank you, your Honor. And I did want to  
06:30:51 5 recognize we don't have with us today Monique Peoples who, I'm  
6 sure, would be here -- hanging in here with us were it not for a  
7 death in her family.

8 THE COURT: I'm sorry to hear it.

9 MR. ROWE: That's our team. And I just wanted to let  
06:31:04 10 you know who was listening on the phone.

11 THE COURT: Thank you.

12 MR. ROWE: Next order of business, apart from I'll  
13 try to be as fast as I possibly can --

14 THE COURT: There's no need to rush. You came a long  
06:31:12 15 way to be here.

16 MR. ROWE: Thank you. -- is our division of labor;  
17 and I will tell you what I will do and what Mr. Lynk will do;  
18 and I will also tell you that if you prefer to do it in the  
19 other order, I'll sit down and he can stand up.

06:31:25 20 So, I will take all of the various operator  
21 issues and try to squash them together where we can.

22 THE COURT: All right.

23 MR. ROWE: I suspect that's where we'll spend most of  
24 our time.

06:31:32 25 I also have what we think of as sort of the extra

1 issues in the case. So I have the -- Exxon's argument that  
2 there's only one facility at each site rather than the two that  
3 we say are there. I have the Government's argument about why we  
4 think the Court might not want to go setting percentage shares  
06:31:49 5 for Exxon now for unknown future costs. And I have Exxon's  
6 argument about adopting Mr. White's allocation method now as  
7 opposed to thinking about it later.

8 Mr. Lynk has the nature of the kind of claim you  
9 get if Exxon has a 107 claim against us, whether that is joint,  
06:32:07 10 several, or whether it's several after the Supreme Court's  
11 Atlantic Research decision which I will probably acronym out on  
12 you and call ARC at some point. So if I do, that's the case I'm  
13 referring to.

14 And he will also talk about this argument that  
06:32:22 15 we've made at Baytown that Exxon claims an (f) (3) (B) case under  
16 the AOC; and if they have that, they must use it. And there's  
17 an SOL problem there. That argument applies only at Baytown.

18 THE COURT: You know what, you're using way too many  
19 acronyms. You sound like a Government lawyer.

06:32:41 20 MR. ROWE: I'll try not to do that. He will talk  
21 about the fact that if you have an administrative order that  
22 allows you to sue under --

23 THE COURT: You're talking about the 113 problem?

24 MR. ROWE: Yes.

06:32:53 25 THE COURT: Okay. And that only applies --

1 MR. ROWE: -- at Baytown.

2 THE COURT: -- at Baytown.

3 MR. ROWE: And the other thing I wanted to tell you  
4 about that -- he's going to tell you in much more detail -- is I  
06:32:59 5 just wanted to note that we have not moved for summary judgment  
6 on that. We're only using that as a manner to resist Exxon's  
7 motion for summary judgment.

8 We can skip the page on the map because I thought  
9 my colleague on the other side did a fine job of that. I had a  
06:33:14 10 few things. They're not worth mentioning. And we'll get down  
11 to operator status.

12 The first thing I wanted to talk with the Court a  
13 little bit about is the legal standard. It is, obviously, in  
14 dispute here.

06:33:26 15 THE COURT: Am I turning to the Bestfoods point again  
16 -- Bestfoods quote?

17 MR. ROWE: You certainly can if you would like. There  
18 are, obviously, two possibilities. Exxon is pressing the FMC  
19 standard as continuing to be relevant after Bestfoods. That  
06:33:42 20 test, basically, seems to us to say that there is -- that all  
21 facts count, which we agree with, and that there's a point at  
22 which the government in its regulatory capacity exercises  
23 sufficient influence over industry or a particular plant that it  
24 becomes an operator. It is in a sense, at least as I look at  
06:34:05 25 it, a quantitative sort of test; and it's very much a judgment

1 call, of course.

2 The alternative theory is Bestfoods. We've all  
3 read that definition. So I won't read it to you again. We  
4 understand, I just want to make clear again, that the government  
06:34:21 5 doesn't have to turn valves or throw switches in order to be an  
6 operator. Substituting for the plant manager will do nicely  
7 under the Supreme Court's test.

8 We're not so sure that requirements, contracts,  
9 or control and allocation of raw materials during wartime or  
06:34:37 10 regulation of labor market and draft affirmance would satisfy  
11 that test. So the reason that we prefer as a litigant the  
12 Bestfoods test is because we think of it as qualitative.

13 It is not -- it still requires judgment,  
14 obviously. All the facts are still fair game, but it is the  
06:34:57 15 character of the intrusion in the everyday operation of the  
16 plant that seems to control under Bestfoods.

17 So in our view, to be perfectly honest about it,  
18 the Third Circuit's test might well allow the government -- is  
19 more likely to allow the government to be held liable. Because  
06:35:13 20 of this idea that you can manage the facility or the plant by  
21 managing the industry, the Bestfoods test does not seem to go  
22 that way.

23 Arguments that --

24 THE COURT: What about the argument that they're so  
06:35:27 25 integrally connected that once you set facility-by-facility



1 limits on -- or requirements for production limits on price and  
2 specific permitted --

3 MR. ROWE: I understand.

4 THE COURT: -- customers, if you will --

06:35:45 5 MR. ROWE: Yes.

6 THE COURT: -- then you have, in essence, dictated  
7 enough of the policy or enough of the choices on how to get  
8 there that it inevitably affects pollution and inevitably puts  
9 you in the position of being an operator, not the only operator  
10 but an operator.

11 MR. ROWE: The best short answer I can give you to  
12 that problem is that we don't believe the government typically  
13 was doing the things that really are commanding people to do  
14 things in a sense plant by plant. The -- even the production  
06:36:22 15 levels at the plants were generally negotiated before the order  
16 was issued is my understanding.

17 THE COURT: Can you speak a little more louder.

18 MR. ROWE: Yes, I'm sorry. I'll get a little closer  
19 here.

06:36:32 20 So, for example, one of the things we've talked  
21 about in this case is the rationing of steel and the  
22 government's refusal to approve steel for various projects, and  
23 we'll pick up a few knits about that while we're here; but the  
24 main points in the context of your question is --

06:36:47 25 THE COURT: I think that was primarily insofar as that

1 dealt with the Baton Rouge separator issue.

2 MR. ROWE: That's correct. That's correct. And we'll  
3 do a little bit of that while we're here so we don't have to do  
4 it later. But in answering your question, the point is that  
06:36:58 5 steel was rationed economy wide. Anybody who wanted to build --  
6 and it was rationed because it was in short supply. So it  
7 wasn't just rationed at Baton Rouge or Baytown. It was rationed  
8 everywhere, and that applied to a plant that didn't have any  
9 government contracts.

06:37:15 10 Just in passing a couple of minutes about the  
11 Baton Rouge situation, I know Mr. Steinway showed you a letter  
12 from the Corps of Engineers. We also, I think, have shown you  
13 some evidence that that problem had been around at that plant  
14 since the mid-1930s and had not been fixed.

06:37:32 15 There was actually an industrial design for  
16 fixing it by 1937 which was not implemented. As far as we can  
17 tell, the only reason that Standard at Baton Rouge sought to do  
18 anything about the problem was because the Corps of Engineers  
19 threatened to refer them to the US Attorney's Office, I assume,  
06:37:52 20 for some kind of nuisance claim.

21 They had a barge spill, an oil spill, into the  
22 river; and when they came to look at the barge spill, they found  
23 what -- practices that they did not approve of; and they set  
24 upon Standard and said, "You better do something about this";  
06:38:08 25 whereupon, understandably, Standard came up with every plan they

1 had and submitted it to the government.

2           There was a relatively brief exchange, it  
3 appears, between the Corps of Engineers and the folks who had to  
4 approve the steel. They approved one project and didn't approve  
06:38:24 5 the other one. The determination, basically, was that something  
6 called the silt treating unit would be adequate and that the  
7 master separator could come after the war. So that's what was  
8 done.

9           In addition to that, it's not the case that when  
06:38:40 10 steel is denied for a project all progress about environmental  
11 issues at the plant had to stop, and we should be pleased with  
12 the folks at Standard that during the war they had a waste  
13 reduction program that they thought might actually make the  
14 master separator unnecessary, that did not require any steel.

06:39:01 15           They implemented it. It was quite successful and  
16 it was later done after the war at Baytown. It was, apparently,  
17 not successful enough because they still built the master  
18 separator here. Shortly after the war, the Corps of Engineers  
19 which had set upon Standard -- once they found this oil in the  
06:39:19 20 river, within months, I think, of V-J Day, the Corps was faxing,  
21 "Okay, when are we going to get this master separator built now  
22 because this is still a problem?"

23           And then it takes a long time to get it built,  
24 and it's not -- to me, anyway -- I may need to study this some  
06:39:41 25 more -- it's not entirely clear why. There are some indications

1 of some engineering problems with silt. That might explain why  
2 it did not get done within the approximately one year that  
3 Standard promised the Corps they would have it done.

4 But it did take seemingly longer than that would  
06:39:59 5 explain, and that's about the most I can give you with that.

6 THE COURT: Okay.

7 MR. ROWE: Okay. So back to actual control and  
8 Bestfoods and the test. So what I want to do is just briefly  
9 give you a sense of the problems that the government has or the  
06:40:17 10 disagreements that we have with the actual control test.

11 The first one is if I'm at all right about this  
12 difference in the test or any other difference in the test, it  
13 seems to us that when the Supreme Court speaks to the issue,  
14 that's the end of it. The test is what the Supreme Court says  
06:40:33 15 it is. And while we certainly don't mean any disrespect to  
16 Courts that have found FMC to be instructive or interesting or  
17 otherwise useful afterwards, if they are saying that they're  
18 adopting a test that does not meet the same standard the Supreme  
19 Court has stated, we respectfully disagree.

06:40:53 20 We think Miami Dade got this right; that the  
21 Supreme Court's test while it doesn't formally overrule any of  
22 the prior standards, it does effectively replace them. And that  
23 would include the actual control test which you'll see in FMC  
24 comes from the Landford-Coaldale case which is actually sort of,  
06:41:16 25 ironically, a veil-piercing corporate case. So they borrowed

1 the standard from corporate veil-piercing and tried to fit it  
2 here. And it probably works better than macro-management, but  
3 it's got its problems I think.

4 The Ninth Circuit is still out there holding onto  
06:41:31 5 the authority-to-control test which really scares those of us  
6 who are sovereigns because that would sort of be a problem for  
7 us. We think all of those have been replaced by the Supreme  
8 Court's test in Bestfoods.

9 In addition to that --

06:41:45 10 THE COURT: In Bestfoods?

11 MR. ROWE: Yes, in Bestfoods. We absolutely think  
12 Bestfoods is the test. And we're going to talk a little bit  
13 about some of those details as we go.

14 In addition to the fact that we think the Supreme  
06:41:58 15 Court has spoken, we have a sort of fundamental analytical  
16 problem or two with the actual control test, and that is, that  
17 it seems to us that the actual control test, basically,  
18 conflates CERCLA allocation in which Courts are given very broad  
19 discretion. You can use the Gore factors or the not Gore  
06:42:16 20 factors or you can use the status, whether they're an operator,  
21 an arranger, or an owner or you cannot use that. You have lots  
22 of discretion when there's the allocation once people are  
23 liable.

24 The problem with this test is it effectively  
06:42:30 25 conflates that with what is, basically, a simple question of

1 statutory construction that does not involve equitable  
2 discretion. It's just a question of what the word "operator"  
3 means in the statute.

4 In addition to that problem, there is the  
06:42:43 5 additional problem of the fact that we learned in FMC, somewhat  
6 to our chagrin, that -- and I think the Court was probably right  
7 about this -- that we argued that there was a sovereign immunity  
8 problem and that the rule should be construed strictly and the  
9 Government should get a different standard that actually helped  
06:43:04 10 us rather than the one you were talking to Mr. Steinway about a  
11 few minutes ago.

12 The Court didn't agree, and it cited Indian  
13 Towing in the Supreme Court and, basically, said, "Look, the  
14 waiver is clear and the liability, basically, is the scope of  
06:43:17 15 Section 107." So whatever those standards are, if the  
16 government meets those standards, they're liable.

17 And that means when we're construing Section 107  
18 that we have to pay at least some attention to the idea that  
19 waivers are strictly construed, we would contend. I'm not  
06:43:32 20 suggesting -- I'm not arguing with the Supreme Court's -- I'm  
21 sorry, with the Third Circuit's suggestion that the waiver is  
22 what it is.

23 But I am saying there has to be some echo of that  
24 out here because if we just keep expanding Section 107 terms  
06:43:47 25 more and more broadly in some of the ways that we see Exxon

1 wanting to do, we're not only doing that in derogation of the  
2 ordinary rules of statutory construction where we read the plain  
3 words, we're also doing it in derogation of the rule that strict  
4 construction applies to waivers.

06:44:02

5 And with a bit of help from Chief Judge Sloviter  
6 in her FMC dissent -- I didn't get to read these cases but I  
7 want to at some point -- you'll see in there -- I think it's 29  
8 F3d at 850 -- she actually looked up the cases and found some  
9 that say what happens when strict construction of the waiver

06:44:25

10 meets admittedly liberal remedial sense of CERCLA? And the  
11 answer is strict construction wins, apparently. I haven't read  
12 the cases, but you might want to -- I certainly want to look at  
13 them when I get a chance.

06:44:40

14 Lastly, our problem with actual control is we  
15 just think it's a lousy test. It's not much better than  
16 macro-management. It is very broad. It doesn't really tell you  
17 very much. It's hard to define. It's highly subjective, excuse  
18 me, and it provides very little guidance to Courts or lawyers.

06:45:01

19 And I'll give you a couple of examples of ways  
20 that we think that is true. One is that you have the FMC case  
21 that comes along and seems to think the government is widely in  
22 control of everything and says we're liable.

06:45:22

23 Then shortly thereafter, in a series of cases  
24 that either seek to distinguish FMC, even though the facts seem  
25 to be fairly similar, or adopt the FMC test and nevertheless

1 hold the government liable. There's a whole series of these.  
2 We almost think we have a trend going now with these cases.  
3 It's just under the wrong test.

4                   So early on, I think before Bestfoods, we had  
06:45:39 5 East Bay MUD and Iron Mountain Mines. The judge in East Bay  
6 MUD, I think, went out of his way to try to distinguish FMC. I  
7 leave it to the Court whether that was entirely successful or  
8 not.

9                   Then we have the defoliate cases, Vertac and  
06:45:53 10 Maxus Energy, both of which have lots of government involvement  
11 with the plant, both of which seem to nod to FMC, both of which  
12 find the government is not liable.

13                   There's a good case in the Ninth -- I'm sorry, in  
14 the Central District of California in 2009. That's the  
06:46:06 15 Steadfast case you have in our briefs. It's not a good case in  
16 itself. It's actually an easy case, I think, because the only  
17 evidence of government involvement is a safety manual. It's  
18 good because it has a nice list in it of cases that use the  
19 actual control test and nevertheless hold the government's not  
06:46:22 20 liable, cases like Washington versus United States, the  
21 shipyard.

22                   Rospatch Jessco is one that I would particularly  
23 take a look at. That's a Korean war aircraft engines case, and  
24 there are a lot of facts that are not that different from FMC.  
06:46:36 25 And Coeur d'Alene which is another mining case like Iron



1 Mountain Mines but much later.

2                   That case is -- I think we have it in the brief;  
3 but just in case we don't, it's 2009 WL 3785565 and the  
4 discussion begins at page star four.

06:46:52 5                   THE COURT: Okay.

6                   MR. ROWE: I heard Mr. Steinway talk about Township of  
7 Brighton. We have a rather different view of that case than he  
8 does. First of all, we certainly don't think it establishes any  
9 new special rule for the government. It does not purport to do  
06:47:08 10 so. It purports to simply be applying the same rules that have  
11 always been applied.

12                   But for us, it serves as a good illustration of  
13 the problems with FMC and the actual control test. You have  
14 three judges. You have three opinions. You have -- I think --  
06:47:25 15 I think it was Judge Dowd in the dissent who finally voted for  
16 something so that there would be a result. He actually says in  
17 the opinion: Well, this is all confused but I'm going to vote  
18 for this and try to make this case go away.

19                   All three of those opinions claim both Bestfoods  
06:47:41 20 and the actual control test; and at least, two of them,  
21 obviously, come to completely different results. So we don't --  
22 in addition to the fact that we think it's -- the Supreme Court  
23 has supplanted it and it's legally wrong and in derogation of  
24 the waiver sovereign immunity problem, it's just not a very good  
06:48:01 25 test.

1 THE COURT: In what way is it deficient?

2 MR. ROWE: Is it deficient?

3 THE COURT: Yes, sir.

4 MR. ROWE: We would say that it's -- it's not so much  
06:48:08 5 that it's deficient is that it doesn't help you very much. It  
6 just allows your Honor or any other judge to make a sort of  
7 vaguely defined judgment about when the government is  
8 interfering enough, even though it may not be running the plant,  
9 that it will be said to be liable. It makes -- it makes  
06:48:26 10 everything completely subjective in our view. I understand  
11 there may be differences of opinion about it, but that's the way  
12 we look at it.

13 Does that answer your question?

14 THE COURT: Yes, I think so.

06:48:36 15 MR. ROWE: And I may be able to help. I actually have  
16 a little metaphor that I thought I would do. I will try to do  
17 it very quickly. It's just an example of how this might look if  
18 we did it today.

19 So if we take something very familiar like the  
06:48:50 20 manufacture of an automobile today, the government has lots and  
21 lots of rules even in normal peacetime circumstances that apply  
22 to how you manufacture an automobile. There are safety rules  
23 about bumpers. There are safety rules about air bags now and  
24 I-beams on the side of the car. There are environmental  
06:49:09 25 controls, emissions control standards, urea for diesel engines

1 and various things for catalytic converters for gasoline  
2 engines.

3 Both of those things cut against or at least make  
4 it more difficult to comply with a third kind of standard for  
06:49:21 5 gas mileage because they make the car heavier but, nevertheless,  
6 we're now going to have some rules with some fairly significant  
7 teeth about the efficiency of automobiles.

8 In addition to that, the government will impose  
9 taxes on automobiles and on fuel. Some of those taxes are just  
06:49:36 10 to raise revenue. Some of them are, even today, designed to  
11 change behavior. So if you drive a Prius or a Tesla, you get a  
12 tax break in much the same way that Exxon's predecessors got tax  
13 breaks if they had certificates of necessity that they were  
14 doing a product for the war back in World War II.

06:49:54 15 And there, of course, are lots of rules governing  
16 behavior on the factory floor. So the government is going to  
17 get involved in the emissions standards for paint booths when  
18 you make the car. They're going to get involved in worker  
19 safety rules. There are all kinds of labor and LRA and LRB type  
06:50:10 20 things that you have to comply with in your factory even in  
21 peacetime.

22 Many of those rules will change the nature. They  
23 will funnel what a -- an entrepreneurial actor is able to do.  
24 And I would suggest that if anybody doubts that, you might ask  
06:50:29 25 the CEO of any automobile company how much they would really

1 like to have a single set of safety standards between the United  
2 States, Europe, and Japan and a couple of other markets maybe  
3 that they would hope would be the same.

4           Some of those rules may be controversial or  
06:50:47 5 unpopular. We had a rule for a long time that at least the gear  
6 heads on the sites that I occasionally visit didn't like about  
7 advanced headlights. We had a rule that said you had to use a  
8 very standard kind of headlight. Europe was light years ahead,  
9 and this was terrible. But that was the rule we had.

06:51:02 10           And we have been talking about having a rule  
11 about a further percentage of ethanol in gasoline in the winter.  
12 That's very unpopular with some folks. You know, there are  
13 arguments that it's not actually environmentally beneficial.  
14 There are arguments that it will cause the rubber hoses in cars  
06:51:21 15 already manufactured to deteriorate because ethanol is corrosive  
16 to rubber, apparently, or this kind of rubber. And there are  
17 even some people on those same sites, which I'm certainly not  
18 saying are necessarily authoritative, that say that a marvelous  
19 six-cylinder BMW engine in both my car and Mr. Steinway's will  
06:51:38 20 actually start to knock if we -- so some of these things are not  
21 very -- they're intrusive, they're not popular, and people may  
22 not want to do them.

23           And of course, those controls will be tighter  
24 even still in wartime. Fuel will be rationed, all the same  
06:51:54 25 sorts of things you saw in World War II. And yet, I would

1 submit to the Court that no one would seriously contend that the  
2 United States Government today is operating the BMW plant in  
3 South Carolina. It's just not.

06:52:05 4 THE COURT: Is the government telling those plants how  
5 much to produce?

6 MR. ROWE: No. And I don't believe the government --  
7 I mean, I understand there may be a factual dispute about this.  
8 It is true that there are -- are documents that say how much  
9 plants will produce. Most of those documents in this case are  
06:52:19 10 contracts. So the government has negotiated with folks -- in  
11 the case of the master avgas contract, I think it -- I don't  
12 remember if it sets volumes or not but it sets price per  
13 volumes.

14 So for the first so many barrels there's one  
06:52:35 15 price and then the price goes down a little bit; and if there  
16 are labor shortages or other problems, you can get adjustments  
17 and renegotiate.

18 Some of the Plancor contracts I think do set  
19 amounts, but those are amounts that people have agreed that they  
06:52:51 20 can produce. And I think that, for example -- if I remember  
21 correctly, I think it's the Baytown Ordinance Works actually has  
22 a clause in the beginning of that contract that you'll see if  
23 you take a look that says that in the early parts, before the  
24 plant's really up and running, they'll try to make as much as  
06:53:06 25 they can and we'll buy it if they can make it.

1 And it's only after they get the plant up and  
2 running the way they expect that they sort of -- they have the  
3 contractual obligation to make a particular amount. So I'm not  
4 -- I don't think I can represent to you categorically that there  
06:53:22 5 are no orders but I think you'll find, if we dig into them a  
6 little more, there are requirements.

7 Most of them are in contracts and most of them  
8 are negotiated, and I believe my historian would tell you when  
9 he gets here -- I'm not sure we've had him put this in his  
06:53:36 10 report yet -- that even when there were directives, people went  
11 to Washington. The folks in Washington running the Defense  
12 Plant Corporation said --

13 THE COURT: So again, you're going back to your  
14 argument to the fact that there might have been authority to set  
06:53:48 15 those directives isn't sufficient absent --

16 MR. ROWE: Not quite. But I understand your point and  
17 I do agree with you, but that's not -- what I was saying here is  
18 more -- even things that look like orders during the war are not  
19 necessarily coercive.

06:54:01 20 THE COURT: So even the exercise of that authority  
21 isn't sufficient if it's negotiated? Is that where you are,  
22 bottom line?

23 MR. ROWE: I'm not sure I was going quite that far,  
24 but that's the thrust of what I'm saying, yes. I'm saying, for  
06:54:15 25 example --

1 THE COURT: Make it as nuanced as you want to but see  
2 if you can get -- summarize it for me so I capture your point.

3 MR. ROWE: No, no. I think that your formulation is  
4 fine. I'm simply suggesting that -- and there was -- the other  
06:54:28 5 reason that orders were commonly issued during this period is  
6 because of antitrust problems. If the government issued you an  
7 order to collaborate with your peers in the planned blending  
8 program or various other things they were doing, that protected  
9 you from antitrust law, which is something people in these  
06:54:44 10 industries were very concerned about at the time.

11 So I'm simply -- I guess the shortest version of  
12 what I'm saying is everything is not as it appears. That's all  
13 I'm really saying, I think.

14 So I think you might be inclined to ask me -- I  
06:55:03 15 think I would if I were the Court -- whether or not the  
16 Government's interpretation of Bestfoods then is too  
17 restrictive? Is the government going to get off scot-free all  
18 the time? And the answer to that question is no for two kinds  
19 of reasons.

06:55:16 20 The first is we're not arguing that this is some  
21 kind of exclusion. I'm not suggesting that government behavior  
22 or even regulation cannot make the government an operator. I'm  
23 just suggesting that it usually doesn't. And of course, we also  
24 have --

06:55:31 25 THE COURT: Well, I mean, if --

1 MR. ROWE: Sorry.

2 THE COURT: With all due respect, whether it can or  
3 often does not doesn't really help me with understanding whether  
4 on this record it did.

06:55:47 5 MR. ROWE: Yes. We'll -- I'll be there in just a  
6 moment.

7 THE COURT: Okay.

8 MR. ROWE: The second sort of -- in fact, we can  
9 almost start right now. The second point I wanted to make about  
06:55:58 10 this is that there are cases that have been decided in the  
11 record right now where this test would likely produce federal  
12 liability, this test being the Supreme Court's test.

13 One of those, I think, is probably Cadillac  
14 Fairview. And I want to talk with you a little bit about that  
06:56:16 15 plant because it's a great distinction that -- the things that  
16 are going on at the plant are readily distinguished from what  
17 goes on with most of the Plancors here.

18 The reason you don't see much about liability in  
19 that case, I think, is because the government owned the plant.  
06:56:29 20 So it's really just all about allocation once we owned the  
21 plant. I don't think -- I think the Court does find that we're  
22 an owner, operator, or arranger; but there's very little  
23 discussion about it in the case.

24 What there is the discussion about in the case is  
06:56:41 25 the facts. Here are some facts about Cadillac Fairview as



1 reported by the Court. The government had a design for these  
2 plants. This was -- I should back up and sort of make a little  
3 bit of a concession here. I agree with Mr. Steinway that rubber  
4 was a very big deal during World War II.

06:57:01

5 There are people who would tell you that is  
6 second only to the atomic bomb in terms of the difficulty and  
7 importance of what was being done. It was definitely a crash  
8 program. We lost all our natural rubber to the Japanese and we  
9 needed to get this done. Because that was the case, at the very  
10 pentacle of the rubber program, as best I can understand it  
11 right now, there are some very unusual Plancors.

06:57:20

12 They're not like most of the Plancors in the  
13 system. Those are the agent plants. And what the government  
14 did is it actually hired a bunch of people from the industry to  
15 try to figure out how to make the synthetic rubber. They  
16 figured it out. They ran pilot plants. This is all reported in  
17 the case. They created these pilot plants. They figured out  
18 which one works the best; and then they said, "That's what we're  
19 going to do."

06:57:35

06:57:53

20 So if you were running a styrene copolymer plant  
21 for the company, in Dow, for example, here were the rules: You  
22 had to build the plant to the design written by the government,  
23 not like here where the company designs the plants. You had to  
24 -- there was a standard operating procedures manual, and I'm not  
25 talking about the kind of manual Mr. Steinway is talking about

06:58:11

1 with administrative procedures, I'm talking about which valves  
2 to turn, how high to heat this stuff, and how we were going  
3 to --

4 THE COURT: Micromanaging.

06:58:22

5 MR. ROWE: Yes, that would be fair. Or technical  
6 management might be fair. And there was a --

7 THE COURT: That doesn't answer the question. That  
8 may have been sufficient; but if what we have here is fairly  
9 characterized as macro-managing, at what point does the

06:58:36

10 Government think it becomes insufficient --

11 MR. ROWE: Well, I don't know what --

12 THE COURT: -- for operator liability?

13 MR. ROWE: I don't have any idea what macro-managing  
14 means so I'm not even going to try to speak to that.

06:58:48

15 THE COURT: Well but I really need you to.

16 MR. ROWE: Well --

17 THE COURT: I need the Government's understanding.

18 MR. ROWE: I think I understand your question, and I  
19 will try to answer it.

06:58:52

20 THE COURT: All right.

21 MR. ROWE: I just don't know how to do it in terms of  
22 macro-managing because I don't know what that means.

23 And I think the simple answer is we go back to  
24 Bestfoods. If the regulations were -- or the behavior that I  
25 was just describing in Dow reaches the point where the

06:59:05

1 government is directly involved in the operations of the plant  
2 on a day-to-day or week-to-week basis -- and I don't mean  
3 turning valves; I mean, you know, managing the plant will do  
4 fine -- then we're liable as an operator. We don't think that  
06:59:21 5 happened here, and it's really as simple as that.

6 I don't know how to embellish anymore for you  
7 except that we're going to go through some detailed facts here  
8 in just a second, and I'll tell you what I think that means.

9 Okay. So my point about -- kind of like Fairview  
06:59:35 10 is, though, twofold. One is there are places for this rule,  
11 this -- what I would -- what Exxon would certainly say is a more  
12 restrictive rule to operate; and there's already case law out  
13 there with examples of fact patterns where we would still be  
14 liable as an operator.

06:59:49 15 The other thing that's interesting about that  
16 case, though, is not just Exxon but most opponents of the  
17 Government in these cases are very quick to emphasize  
18 regulation. "The government regulated this and forced us to do  
19 that."

07:00:04 20 In that Dow situation, if you look at the things  
21 I just told you that we required, they were all required by  
22 contract. So if you're really looking to see where the  
23 government was an operator, maybe this will be a piece of the  
24 answer to your question. It's probably more often going to be  
07:00:22 25 found in a situation where the parties agreed to do it because

1 there's no rule that says if we agree with somebody that we're  
2 going to help them run the plant that that doesn't make us an  
3 operator. There's no such rule. We would be an operator. And  
4 it appears that in practice that's more likely to be the case.

07:00:41

5 So I guess I'll wrap up the legal argument now  
6 and we'll get down to the facts with just one thought, and that  
7 is, that in the most rudimentary terms, the Government's gripe  
8 with the actual control test is that it does not include -- it  
9 does not include an "of what" question. That's what the Supreme  
10 Court test adds. It says you got to be running the refineries,  
11 essentially. That's all it seems to be saying. We don't think  
12 we were running these refineries, and we don't think we were  
13 running the Plancors.

07:01:01

14 So now let's talk about some -- now I'm going to  
15 switch away from the legal standard; and I will tell you that we  
16 believe, notwithstanding our objections to the actual control  
17 test, that under any standard, whether it be the Supreme Court's  
18 test or the actual control test -- I'm going to leave off the  
19 authority-to-control test for the time being; but we don't  
20 believe the facts would render us liable in these particular  
21 instances as an operator in -- as the several places around the  
22 plant will now do.

07:01:15

07:01:30

23 There are a couple of little places I would like  
24 to go before we get to the specific facts because this is not  
25 something that we are visiting for the first time even within

07:01:47

1 the entire world of CERCLA jurisprudence. This is something  
2 that Courts have needed to address before; and with more thanks  
3 to Chief Judge Sloviter who called this to my attention in her  
4 dissent in FMC, I wanted to tell the Court about a case that I  
07:02:05 5 do not believe is cited in our briefs.

6 It is Lichter versus the United States. It is in  
7 the handout that I just gave you. It's 334 US 742, and the  
8 discussion is at 767 and 68. It's a 1948 Supreme Court case.  
9 It, obviously, has nothing to do with operator liability. What  
07:02:25 10 it is about is a challenge to the constitution of some of the  
11 renegotiation -- I'm sorry, the constitutionality of some of the  
12 renegotiation acts that came out of World War II about profit  
13 and pricing.

14 So the Supreme Court in the process of laying out  
07:02:40 15 the fact pattern for that case describes the federal plan for  
16 industrial operations during the war as follows. I'll read it  
17 as quickly as I can. "Laying aside as undesirable the complete  
18 governmental ownership and operation of the production of war  
19 goods of all kinds, many alternative solutions were attempted.  
07:03:00 20 Often, these called for capital expenditures by the government  
21 in building new plant facilities.

22 "Adhering, however, to the policy of private  
23 operation of these facilities, Congress and the administration  
24 sought to promote a policy of wide distribution of prime  
07:03:15 25 contracts and subcontracts even to comparatively high cost

1 marginal producers of unfamiliar products.

2 "Congress sought to do everything possible to  
3 retain and encourage individual initiative in the worldwide race  
4 for the largest and quickest production of the best equipment  
07:03:32 5 and supplies. It clung to its faith in private enterprise."

6 That is not a statement of the Government's  
7 position of the case. It is not a statement from a Government  
8 expert. That is the Supreme Court of the United States less  
9 than three years after V-J Day.

07:03:47 10 THE COURT: So you think Judge Fletcher just blew it  
11 in his description?

12 MR. ROWE: No, I don't. I actually think Judge  
13 Fletcher is pretty close. I don't think that his treatment and  
14 this treatment are particularly --

07:03:57 15 THE COURT: Tell me what you would reject from his  
16 description --

17 MR. ROWE: From Judge Fletcher's description?

18 THE COURT: -- and what you would accept.

19 MR. ROWE: Nothing, nothing.

07:04:03 20 THE COURT: So you accept both sides of it then?  
21 That's pretty good.

22 MR. ROWE: I'm somewhat surprised -- well, a couple of  
23 things about Judge Fletcher's, I think, rather well done  
24 treatment about this.

07:04:13 25 THE COURT: No, I agree. I thought it was eloquently

1 stated. I'm just trying to figure out if either side disagrees  
2 with any significant part of his characterization.

3 MR. ROWE: Well, I don't. So that's the answer to  
4 that. But I also have a couple of observations about it, one of  
07:04:27 5 which is that Exxon likes to quote or cite Judge Kelleher.

6 THE COURT: I know.

7 MR. ROWE: And if you look at Judge Kelleher's  
8 decisions, they are very much not in the same vein as Judge  
9 Fletcher's description. He did not -- he was, I think, very  
07:04:41 10 measured and very polite about the way he did this as well as  
11 being fairly eloquent. He did say, "I don't think that's what  
12 happened."

13 But if you look, for example, at the 1995  
14 liability decision from Judge Kelleher -- that one, by the way,  
07:04:56 15 is only on Lexis. It's 1995 US District Lexis 19778, and it's  
16 at pages 23 and 24. You will see something that is more like  
17 what Exxon likes to quote: "The undisputed facts reveal that  
18 the actions of the United States resulted in, as a practical  
19 matter, almost total control over the production of avgas."

07:05:15 20 You don't see Judge Fletcher saying things like  
21 that. I had two quotes. I'm not going to read them to you  
22 because it's clear that you've already read the passage. I am  
23 delighted if Exxon does agree; but I think if they're going to  
24 agree that that is a fair treatment, they're going to have to  
07:05:29 25 abandon some of these sort of more hyperbolic quotes, if you

1 will, from Judge Kelleher.

2                   The two cannot be reconciled. And I will tell  
3 you that I was struck by the same passage you were and I had  
4 Mr. White, Exxon's expert allocator, read it during his  
07:05:47 5 deposition; and he also had no disagreement with it. So I think  
6 in many respects that may become a telematic statement of our  
7 view about how the war was fought.

8                   I don't think there's any difference between what  
9 I just read you from the Supreme Court. It's a little more  
07:06:02 10 flowery. But the fact is that the government relied on private  
11 industry does not mean that there were not some teeth in the  
12 regulations. I don't think they were saying that. I don't  
13 think they meant to say that. And if they did say that, they  
14 would be incorrect. Judge Fletcher is right about what  
07:06:17 15 happened.

16                   What we would say about those two passages,  
17 Lichter and Judge Fletcher's treatment, is that we have,  
18 therefore, both contemporaneous, in the case of Lichter, and  
19 contemporary, in the case of Judge Fletcher, indications that  
07:06:33 20 Exxon's view that the government was running everything during  
21 the war is not really right.

22                   In addition to that, because we had some issues  
23 about Korea that required us to bring our historical expert into  
24 the mix -- and we had hoped not to give you his report but maybe  
07:06:50 25 now it's going to be a little bit useful.



1 If you would care to read his report, you will  
2 also see the same sense from historians about the cooperation  
3 that went on during the war. You see him talk about tax breaks.  
4 You will see him talk about the assumption of risk of post-war  
07:07:09 5 ownership, which is really why the government owned the  
6 Plancors.

7 During the -- actually somewhat before but,  
8 particularly, during the Great Depression, there was a huge  
9 perceived problem in business of excess capacity. So if you  
07:07:22 10 were in any industry during the war, you understood that World  
11 War II was going to be great for business. What you were  
12 worried about was what was going to happen after the war when we  
13 went back into something akin to the Great Depression and you  
14 had all these plants that you were paying taxes and fixed costs  
07:07:35 15 on and you couldn't do anything.

16 So in a sense, the government's ownership of the  
17 Plancors, somewhat to our chagrin today, I suppose, was a form  
18 of subsidy. It was a way for the government to take the risk  
19 that the capacity would not be good after the war. It did not  
07:07:50 20 turn out that way. Everybody bought the plants. Everybody  
21 thought it was great. There is some dispute among historians  
22 about the deal that industry got on the various plants.

23 And since you have to stay here and it's late and  
24 listen to me drone on, I'll give you a fun tidbit about that  
07:08:03 25 which I got from my historian.

1 THE COURT: That's okay. Keep going.

2 MR. ROWE: Keep going? Okay. Okay. Another time  
3 I'll tell you Lyndon Johnson's story about that.

4 And then, finally, we have -- we had from  
07:08:17 5 depositions from other cases a few individuals who actually  
6 participated in all of this at the time and their testimony is  
7 admittedly mixed. But I wanted to call to your Honor's  
8 attention our proposed -- the Government's proposed statement of  
9 fact, paragraph 36 where there are quotes from Lincoln Gordon  
07:08:35 10 who was the vice chairman of the War Production Board.

11 And I'm not going to give you the quote, if I can  
12 just give you a little piece of the quote: "The idea was that  
13 we would regulate what could be done with the flow of materials,  
14 allocating resources; the conservation of materials, keeping  
07:08:50 15 them from being spent on frivolous things; but that operations  
16 were for individual businesses to carry on." The WPB did not  
17 participate in the actual manufacturing and operations of  
18 individual plants. That's our basic point.

19 THE COURT: But we have one example in which a  
07:09:05 20 decision on allocation directly affected operations, and that's  
21 the Baton Rouge separator. Are there other -- that makes the  
22 point forcefully.

23 MR. ROWE: Yes.

24 THE COURT: But are there others that -- or can you  
07:09:21 25 generalize from that -- I guess what I'm asking is that an

1 exception or was there a general impact of the allocation  
2 choices that drove operations in ways that makes the government  
3 an operator, not the operator, an operator?

4 MR. ROWE: I'm going to try to jump ahead and --

07:09:41 5 THE COURT: In other words --

6 MR. ROWE: I'm not sure I'm going to answer that  
7 question.

8 THE COURT: -- it puts us in the allocation land  
9 instead of joint and several liability.

07:09:51 10 MR. ROWE: Of course, the Government believes the  
11 answer is no and we don't think it even works for the separator.  
12 So it may be that it's better for you to ask Exxon that  
13 question. They may have different ideas.

14 I'm going to jump ahead since we're on this topic  
07:10:02 15 and talk about why we don't think the separator is -- that that  
16 denial of steel for the separator is controlling, and that's  
17 because that depends on the sharpening part of the Supreme  
18 Court's discussion.

19 Bear with me while I find this so I do it right  
07:10:22 20 for you.

21 Yeah. Excuse me one second here so I don't get  
22 completely lost.

23 There is a tendency among commentators for  
24 Plaintiffs these days to see the second part of the Bestfoods  
07:10:51 25 test, the sharpening of the definition that simply says you have

1 to manage or control things that have to do with either the  
2 disposal of waste or the running of environmental programs as  
3 though it is a separate and self-sufficient test for liability.

07:11:11 4 We don't think that it is. We think it is what  
5 it purports to be. It sharpens the principal definition about  
6 what it means to run the plant. And the best way for me to do  
7 that for you quickly is to give you a couple of hypothetical  
8 examples and then we can do more if you're really a glutton for  
9 punishment.

07:11:28 10 Company X hires a consulting firm to deal with  
11 personnel and payroll. They're involved in running the plant.  
12 They're doing management and control things that under the first  
13 part of the definition might seem to catch them. That  
14 sharpening prevents that -- or at least that's the way I see it.

07:11:47 15 A second example: Company X instead hires an  
16 environmental consulting firm to deal with all of its ongoing  
17 environmental compliance issues. That company is also clearly  
18 meeting the first part of the Supreme Court's definition and now  
19 we would say also meeting the second and acting as another  
07:12:05 20 operator of the plant. The plant manager overall is still an  
21 operator. It's a classic dual operator kind of case.

22 The third one and last, I promise, is Company X  
23 hires an engineering firm to install and manage on an extended  
24 basis a new technology for distilling crude oil. So now I'm  
07:12:26 25 talking about the process of making products rather than

1 environmental issues. Same result. Both the manager of the  
2 refinery overall and the fellow who is helping them run this  
3 machine in the plant, they're both involved with things that  
4 have to do with waste.

07:12:42

5 The point is that the converse is not necessarily  
6 true. Every time somebody touches something that has some  
7 indirect impact on environmental behavior at the plant, that  
8 does not mean that actor is running the plant and satisfying the  
9 principal part of the Bestfoods definition.

07:13:06

10 So when we were denying steel for the Baytown  
11 separator, I mean we didn't have any choice but to look at what  
12 the project was. That's the way the rationing program worked.  
13 So it didn't matter if it was an environmental issue or a  
14 construction issue or people wanted to build a new office, we  
15 were going to look at the steel.

07:13:26

16 So if Exxon's view of that is right, if you take  
17 that to its logical conclusion, everywhere during the war where  
18 the government made a single decision denying steel for anything  
19 that has an indirect impact on environmental issues, we're an  
20 operator of that plant, and that just can't be right.

07:13:48

21 So I hope that goes at least part way towards  
22 answering your Honor's question. If you want to try again, I'm  
23 happy to -- okay.

24 Okay. So let's go back a minute and do some  
25 specifics about the plant. And when I say "specific," I don't

07:14:02

1 mean exceedingly specific. I want to -- now we're going to walk  
2 through each of these operator situations beginning with Exxon's  
3 contention that it did not operate its own refineries during  
4 World War II.

07:14:22 5 This was a little surprising for us. We actually  
6 sent them a request for admission somewhere in the middle of our  
7 discovery. We asked them to admit that they were an operator of  
8 their own refineries during the war -- or I think it was more  
9 generic. Anyway, we asked them to admit that they were an  
07:14:37 10 operator of their own refineries.

11 We were not asking them to say that we were not,  
12 just that they were also an operator; and we were surprised when  
13 they said, "Well, outside of the war, yes; but during the war  
14 period, we do not believe we were an operator of our own  
07:14:50 15 refineries."

16 Now we're talking about the government not just  
17 being an operator of their refinery, we're talking about the  
18 government being the operator

19 THE COURT: I understand. And I think Exxon has moved  
07:15:01 20 away from that.

21 MR. STEINWAY: Yes.

22 THE COURT: And you are, in fact, no longer seeking  
23 that relief?

24 MR. STEINWAY: Yes, your Honor.

07:15:07 25 THE COURT: That's correct?

1 MR. STEINWAY: Yes, your Honor.

2 THE COURT: All right. It's denied.

3 I mean, to the extent you were seeking summary  
4 judgment that you were not an operator of your own refinery even  
07:15:18 5 during the war, I'm denying that motion.

6 MR. ROWE: Thank you, your Honor. I'll ask --

7 THE COURT: Any other concessions to clear the  
8 underbrush?

9 MR. STEINWAY: No.

07:15:28 10 THE COURT: No?

11 MR. STEINWAY: No.

12 THE COURT: Okay, keep going.

13 MR. ROWE: Okay, we'll keep working.

14 What I was going to do is give you a list of  
07:15:33 15 things -- and it cuts both ways, so I still have to do it  
16 because it also controls whether we're an operator or not -- of  
17 things that I believe there is no contest in the evidence that  
18 the government did not do at these refineries during the war.

19 I'll read it real quick. And I will tell you  
07:15:50 20 that this case is very complicated, and I'm -- I tried very hard  
21 to stay true to things where we really don't have a big dispute.  
22 There may be knits here and there where I've missed something;  
23 and if so, I will stand corrected.

24 I don't believe there's any evidence that a  
07:16:07 25 government employee ever turned valves, threw switches, or

1 operated machinery at any of these plants. Now if Exxon is  
2 conceding, we don't need to do that, I agree.

3 THE COURT: We don't need to. So keep going.

4 MR. ROWE: Okay. Maybe I'll skip a couple of these  
07:16:15 5 then.

6 THE COURT: That will be good. The ones that don't  
7 matter because we know that they're not -- they're not --

8 MR. ROWE: Yeah, I think you're right. So maybe  
9 we'll just talk then about what the government did do --

07:16:25 10 THE COURT: That will be good.

11 MR. ROWE: -- because that will get us where we need  
12 to go.

13 And of course, there is -- Exxon is still arguing  
14 that we're an operator during the war; and coincidentally,  
07:16:36 15 Mr. Steinway selected one of the favorite ways people do that;  
16 and that's the planned blending program. And this is the one  
17 where you have the quote that "Under this plan, the nation's  
18 refineries were all treated as one big national refinery."

19 I have no problem with that basic concept. I  
07:16:55 20 think we actually treated them as three or four refineries. So  
21 there was a District 3 that was the southeast United States.

22 But in concept, there's nothing wrong with that  
23 statement. We do respectfully -- I think I do disagree a little  
24 bit with Mr. Steinway about telegrams, and you'll see how that  
07:17:11 25 works. There were telegrams. I'm not sure they were about this



1 topic. There may have been some.

2                   So I needed to tell you how -- what this plan  
3 blending program was about and how it worked. Basically, as  
4 Mr. Steinway, I think, alluded to, aviation gasoline is made  
07:17:30 5 with a base stock that is very similar to motor gasoline and you  
6 dump in a bunch of additives which boosts octane and gives you  
7 various other characteristics.

8                   Those additives are a substantial part of the  
9 volume of the avgas that goes out of the plant. Some -- there  
07:17:46 10 may be a dispute about this. I think my side says about half.  
11 It may be slightly less or more and various -- and there were  
12 various recipes for avgas during the war. So it may actually  
13 change over time.

14                   The most familiar example to most people is tetra  
07:18:03 15 lead. That's an additive that helps with knocking. It's  
16 illegal now. But back during the war, that was something you  
17 could do. In a competitive prewar economy, companies that were  
18 wanting to make avgas or motor gas or other products that  
19 required additives like this had to go out and get them and  
07:18:18 20 compete for them on the market.

21                   And at some point, one of these various things  
22 would control how much of the product you could make. And there  
23 was a fair degree of likelihood that you had some other things  
24 left over. Those other things were a significant part of the  
07:18:34 25 key to getting a lot of additional avgas during the war out of

1 an only modestly larger crude.

2           So the idea was if somebody's got codimer over  
3 here or they've got lead over there, whatever we were using in  
4 the recipe, how did we get that from the guy who couldn't use it  
07:18:55 5 because he had other -- some other restraint on his process to  
6 somebody who could use it and then we'd get more avgas? And we  
7 did that several ways.

8           The first thing is we provided orders to protect  
9 people from antitrust concerns. We formed a committee that was  
07:19:12 10 a sort of quasi-government committee, but it was made up of -- I  
11 don't know that it was officially a government committee; but in  
12 any event, it was made up of refiners' representatives who would  
13 meet once a month and they would figure out who's got what and  
14 who needs what and then they would present that to the War  
07:19:30 15 Production Board to make sure nobody was up to any shenanigans;  
16 and we would say "fine" or "stop doing the shenanigans" if  
17 somebody was up to something.

18           And that would become the monthly plan. That's  
19 the planned blending program. And that meant if you were at  
07:19:45 20 Baytown, you knew what to expect. You would have this much  
21 codimer coming in or something that you needed for your output  
22 processor, whatever it was; and that program was tremendously  
23 successful.

24           The question is does it make us an operator? I  
07:19:58 25 agree with Mr. Steinway that's probably as close as anything

1 you're going to get because you have sort of the government  
2 looking over this. But conceptually, I don't really see it as  
3 any different from rationing steel. There's a sort of technical  
4 difference. If you're rationing steel, you know where it is and  
07:20:17 5 you just don't give it away unless you got a project that needs  
6 to be built.

7               The problem with this material is it was spread  
8 all over the place and nobody knew where it was. So we had to  
9 have a program to go find it. The other distinction is if  
07:20:29 10 you're rationing steel, you're conserving. Here, we were  
11 actually trying to recover stuff that we could use to make more  
12 of something.

13               So technically, it's a little different. But  
14 conceptually, it's very much the same. And I guess we don't  
07:20:41 15 think that's the kind of thing that would make us an operator.  
16 It's closer than some other things, but it seems to us that it's  
17 not as big a deal.

18               Now I'll give you another short list. This is  
19 like the other one, but this is of things that we did do by way  
07:21:03 20 of -- in other words, it's not just the planned blending program  
21 that Exxon is arguing; and there's some other things that we  
22 need to talk about.

23               I'm going to give this to you again with my best  
24 understanding of what you'll find when you go through the facts.  
07:21:16 25 This is the rest of the story as I would see it from the point

1 of view of somebody working at the refinery during World War II.  
2 So what's your point of view? What have you got? What's the  
3 government telling you and what they're not.

4 Your crude supply, which is, of course, crucial  
07:21:32 5 to everything you do at the refinery, is assured by allocation.  
6 You don't have to go out and compete for it in the market. You  
7 do have to pay for the crude, and it belongs to you when you pay  
8 for it.

9 There are other raw materials that are allocated  
07:21:45 10 that will help you. I can't tell you chapter and verse what  
11 they are, but there are other programs like that. And there are  
12 draft affirmance and such to help you if you can't hire enough  
13 folks to run the plant. But you're doing the hiring and firing.  
14 You're running the labor. You're doing the labor relations.  
07:22:02 15 You have a contract with your union. The government is not  
16 involved in any of that.

17 Most of these programs, by the way, not that it  
18 matters particularly here, worked to the benefit of large  
19 concerns like Exxon because these were the big companies that  
07:22:15 20 knew how to do things. So they were going to get all the best  
21 stuff. Steel, aluminum, and copper and other materials, rubber  
22 certainly, were rationed; and if you needed to do something that  
23 required a bunch of them, whether or not we had a contract with  
24 you to make avgas, you needed to get a chip for that from the  
07:22:35 25 government. So that overbearing sort of regulatory program is

1 always there in the background.

2 Your supply of blending agents which you need to  
3 make the aviation gasoline comes from two sources. You're  
4 making them yourself in the refinery with whatever processes you  
07:22:53 5 have available or you're getting them out of your oil fields or  
6 wherever you can get them. And you also are getting the  
7 benefits, if you're getting them -- you may be on the sending or  
8 receiving end of this planned blending program.

9 So you may be getting codimer from someplace in  
07:23:07 10 Arkansas, and the hydrocodimer plant that you heard Mr. Steinway  
11 talk about is designed to take advantage of that. Codimer is a  
12 great octane booster which, apparently, will gum up the fuel  
13 lines in an airplane like crazy unless you hydrogenate it.

14 If you do this process with hydrogen, it  
07:23:23 15 becomes --

16 THE COURT: The detail is terrific, but I think you  
17 are well over what you told me was going to be the maximum time.

18 MR. ROWE: I hope that's -- okay.

19 THE COURT: Well, it's almost -- it's 7:20.

07:23:34 20 MR. ROWE: I don't know when I started. So let me see  
21 if I can do Plancors.

22 THE COURT: I'm happy to hear it but --

23 MR. ROWE: Okay. I'll try to go more quickly, Judge.

24 THE COURT: I want to hear from your colleague as  
07:23:46 25 well.

1 MR. ROWE: Okay.

2 THE COURT: And then we need to give the other side a  
3 chance to respond.

4 MR. ROWE: That is certainly true.

07:23:52 5 So I think I've given you -- I have more things  
6 on the list. We'll skip the rest of the list and move on to the  
7 -- we've already talked about the government involvement in  
8 waste disposal. So we'll skip that and we'll go to Plancors.

9 THE COURT: All right. Basically, what you're telling  
07:24:12 10 me --

11 MR. ROWE: If Exxon is making -- sorry, beg your  
12 pardon.

13 THE COURT: Let me ask one question: Basically, what  
14 you're telling me is you don't see any meaningful distinction  
07:24:19 15 between Baytown and Baton Rouge?

16 MR. ROWE: That's right.

17 THE COURT: All right.

18 MR. ROWE: Because of the matters that we talked about  
19 before about how the sharpening definition works.

07:24:25 20 THE COURT: Okay.

21 MR. ROWE: Yeah. It is true that the -- we think the  
22 example of the acid treating facility at Baytown is particularly  
23 unpersuasive because it's a backup system. It never made any  
24 difference in the waste.

07:24:41 25 THE COURT: I understand.

1 MR. ROWE: But conceptually, no difference.

2 THE COURT: That was -- all of that was fully briefed?

3 MR. ROWE: Yes.

4 THE COURT: I'd really like --

07:24:46 5 MR. ROWE: We're happy to stand on our briefs.

6 THE COURT: -- to hear what wasn't fully briefed.

7 MR. ROWE: Yes. I need to ask your Honor a question  
8 now because if Exxon is making that same concession it made a  
9 little while ago about its operation of the Plancors during the  
07:24:58 10 war, we can skip a whole other section.

11 MR. STEINWAY: We're not going to make the concession.

12 THE COURT: Because of the different ownership  
13 structure? All right.

14 MR. ROWE: I'm not -- I mean, your Honor, we concede  
07:25:12 15 that we owned the plants so --

16 THE COURT: I understand.

17 MR. ROWE: Okay, all right.

18 THE COURT: I think the Government's point is that  
19 your ownership had a significant impact on your operational role  
07:25:27 20 as well.

21 MR. ROWE: Well, I guess -- if Exxon doesn't want to  
22 concede this, I'm not going to press the issue. What we're  
23 saying is we owned the Plancors, that makes us a PRP. And if  
24 you're not going to allocate based on status, then the rest sort  
07:25:46 25 of arguably doesn't matter.

1 THE COURT: We are talking about allocation now?

2 MR. ROWE: We would be talking about allocation now,  
3 that's right.

4 THE COURT: All right.

07:25:53 5 MR. ROWE: So I didn't want to talk about that. But  
6 since Exxon did not own the Plancors, it is not unimportant, to  
7 the government anyway, that they were operating them under  
8 contracts which, in several cases, actually called them the  
9 operator.

07:26:10 10 THE COURT: I guess maybe it is worth asking the  
11 question in a more pointed way.

12 Is Exxon standing on its position that it is not  
13 an operator at all of the Plancors?

14 MR. ROWE: Right. That's the only question. I'm  
07:26:22 15 sorry if I was not clear.

16 THE COURT: You are.

17 MR. STEINWAY: With respect to the Plancors, your  
18 Honor, we've argued the agency position and the factual  
19 position.

07:26:29 20 THE COURT: Is the agency position the basis on which  
21 you say you're not the operator?

22 MR. STEINWAY: And the operational control and the  
23 fact that -- the factual operational issues of the rubber  
24 industry was really directed by the government. As you --

07:26:42 25 THE COURT: Macro-managing? Ownership plus



1 macro-managing by the government you think is sufficient --

2 MR. STEINWAY: Yes, your Honor.

3 THE COURT: -- to make them the only operator?

4 MR. STEINWAY: With respect to the --

07:26:52 5 THE COURT: Because in the other position you've taken  
6 -- you've argued that macro-managing means that they are also an  
7 operator. Here, you're taking the position that ownership plus  
8 macro-managing means they're the only operator.

9 MR. STEINWAY: Because of the ownership status.

07:27:05 10 THE COURT: So that makes you the agent. If you take  
11 agency out of it, common law agency --

12 MR. STEINWAY: Yes.

13 THE COURT: -- are you an operator?

14 MR. STEINWAY: We have -- no, we do not feel from the  
07:27:19 15 Plancor perspective we would be an -- or the refinery, as you --

16 THE COURT: Okay.

17 MR. STEINWAY: -- granted the Government's motion on  
18 operator --

19 THE COURT: All right. I'm trying to figure out the  
07:27:31 20 principle distinction other than the ownership. But I guess we  
21 look at the contracts to make those determinations more than  
22 anything else.

23 MR. STEINWAY: The operational control factors in  
24 terms of price, the FMC --

07:27:42 25 THE COURT: That's true in the refineries, as well.

1 That's why I'm having trouble with the principal distinction.  
2 You made the same argument in the refineries; and other than  
3 ownership, you said "But that doesn't mean we're not an  
4 operator. That means that they are, too." Here, you're making  
07:27:59 5 the identical arguments -- and I've asked you to take agency, I  
6 understand that. I've asked you to make that assumption. But  
7 if we make that assumption --

8 MR. STEINWAY: Your Honor, if --

9 MR. BUTHOD: In fairness, Judge, the problem is when  
07:28:12 10 you say "other than ownership," it's a little like saying --

11 THE COURT: I'm not saying other than ownership, I'm  
12 saying other than agency.

13 MR. BUTHOD: But I guess what I'm saying is the  
14 ownership distinction is not idle.

07:28:22 15 THE COURT: I'm not saying it's idle. It may affect  
16 allocation in a huge way. But the question is are you an  
17 operator? Does the fact that you are not the owner --

18 MR. BUTHOD: We do not concede that we're an operator  
19 of the plant.

07:28:38 20 THE COURT: That's fine. But again, I'm having  
21 trouble, if we set aside common law agency, figuring out a  
22 principle distinction here between your arguments on the  
23 refinery side and the -- for not being -- for having no role. I  
24 understand how it directly impacts allocation, but that's a  
07:28:56 25 little different.

1 MR. STEINWAY: From a liability -- you're talking from  
2 a liability perspective?

3 THE COURT: Absolutely.

4 MR. STEINWAY: I understand.

07:29:03 5 THE COURT: You're taking the position regardless of  
6 -- "Because of the impact of macro-management plus ownership, we  
7 were not an operator at all." At all. That's pretty -- that's  
8 stout, and I'm having real trouble with that. That,  
9 essentially, means you had no role.

07:29:30 10 MR. STEINWAY: It's a matter of degree.

11 THE COURT: That's my point. That's my point. For  
12 you to take the position "We had no authority," real or -- "We  
13 had no authority that we either had the right to exercise or we  
14 did exercise as an operator" seems to me to be a difficult  
07:29:55 15 position for you to take, with respect -- due respect.

16 MR. STEINWAY: We understand your position, your  
17 Honor, in terms of the consistency of the philosophy of  
18 macro-managing per se.

19 THE COURT: I'm not talking philosophy, I'm just --  
07:30:08 20 this is pretty common sense stuff. You guys were the ones  
21 turning the valves. You did have a significant management role  
22 on this -- in these Plancors. You weren't absent.

23 MR. STEINWAY: We will concede there's an operator  
24 liability perspective.

07:30:24 25 THE COURT: I'm saying that everything you're saying

1 matters terribly for allocation.

2 MR. STEINWAY: We understand.

3 THE COURT: But that's different.

4 MR. STEINWAY: Our view is operator liability and  
07:30:35 5 operator damages are somewhat coextensive: the more liable you  
6 are, perhaps, the more operator damages you may have.

7 THE COURT: A little different from saying, "We were  
8 Casper, the Friendly Ghost. You didn't even see us."

9 MR. STEINWAY: It's a liability perspective per se.

07:30:52 10 THE COURT: That's exactly my point.

11 MR. STEINWAY: We will concede, your Honor, that from  
12 a Plancor perspective, Exxon is an operator.

13 THE COURT: Yeah. I just was having real trouble  
14 understanding how you could take a different position. All  
07:31:07 15 right.

16 MR. ROWE: Turn the page.

17 I'm actually getting very close to the end,  
18 Judge.

19 THE COURT: And I don't mean to rush you. This is  
07:31:12 20 important.

21 MR. ROWE: No, I understand.

22 THE COURT: But I want to make sure that we're  
23 focusing on what matters and what really wasn't unpacked in the  
24 briefs.

07:31:19 25 MR. ROWE: So Exxon is saying, okay, it was an

1 operator. They're also saying we were an operator of the  
2 Plancors. There, we have somewhat of a disagreement. We did  
3 own them. So you're right that we're into allocation. But in  
4 part, because Mr. White proposes to you that you allocate based  
07:31:37 5 on status, this does still matter.

6 The shortest possible version of the argument is  
7 -- as far as I know, there's no analog of the planned blending  
8 program with respect to the Plancors. So there's nothing quite  
9 that dramatic, if you will.

07:31:54 10 There is, however, greater restriction on what  
11 you spend your money on, capital costs; and there's more  
12 paperwork because we own the plants and we're spending the  
13 taxpayers' money. We're paying for everything that's being  
14 built in the plant.

07:32:07 15 So that's probably a little bit of a trade-off  
16 relative to what we saw at the refinery. Otherwise, we can put  
17 ourselves in the place of a plant manager of, say, the butadiene  
18 plant -- that's the middle one -- during World War II, say, in  
19 the middle of 1943; and we can try to see what the world would  
07:32:23 20 look like.

21 In this case, your basic input stock, which is --  
22 never mind the technical issue -- comes from the refinery. You  
23 would continue to benefit -- it just comes from the refinery  
24 because it's a byproduct, the input. That's why they were  
07:32:37 25 co-located. I don't agree with Mr. Steinway that the government

1 made some grandiose decision. This is just the shortest pipe  
2 from here to there. But that's how it worked.

3           You continue to benefit from the draft  
4 affirmance. Steel, copper, all those rationing programs are  
07:32:53 5 still in place. You have been aware of Humble's lease agreement  
6 under which you did, while you were building the plant, operate  
7 as an agent of the Defense Plant Corporation.

8           You would also have been aware of the operating  
9 agreements which explicitly provide -- they don't say the word  
07:33:12 10 "agent," but they do say the words "independent contract" --  
11 actually, they do say -- they say both.

12           For certain very limited purposes of purchasing  
13 and selling things --

14           THE COURT: I understand.

07:33:21 15           MR. ROWE: Okay, you already -- so -- but when you're  
16 running the plant, there's --

17           THE COURT: That part I understood from the briefing  
18 and it was clearly laid out.

19           MR. ROWE: There are, of course, pricing provisions in  
07:33:31 20 the contract. I believe those were negotiated as part of the  
21 contract. There are also -- I don't think I mentioned this  
22 before and I should have with respect to the refinery -- profit  
23 limitation regulations during the war. There had been great  
24 profiteering in World War I.

07:33:45 25           There were interwar Nye Commission merchants of

1 death hearings in the senate and there was great concern that  
2 there would be more. So there are some regulations on profits.  
3 I don't think they bite quite as much as Exxon -- sorry.

07:33:58 4 THE COURT: If the Government is agreeing that it is  
5 an operator -- I mean, sorry, if Exxon, but that it should be  
6 viewed as having a significantly less -- lower degree of  
7 responsibility than the government, what is the relevance of the  
8 fact that the arrangement between the allocation of duties and  
9 control was negotiated as opposed to imposed?

07:34:25 10 Now, I understand that if it had been imposed  
11 coercively, that would cut heavily against operator exposure.

12 MR. ROWE: That's all I'm saying.

13 THE COURT: But they've agreed that it's --

14 MR. ROWE: No. I don't -- I'm not saying we should  
07:34:38 15 get out because it was negotiated, I'm saying we should not be  
16 dragged in because it appears to be a command. The prices --

17 THE COURT: If you're talking about the Plancors which  
18 you own, you're in anyway.

19 MR. ROWE: Oh, okay. I'm sorry, I may have  
07:34:51 20 misunderstood your point and --

21 THE COURT: And I don't think you're saying that you  
22 had no operator responsibility.

23 MR. ROWE: Let me put it to you this way. Well, I  
24 think we are saying we had no operator responsibility at those  
07:35:02 25 plants. We are an owner and we may be an active owner; but

1 having said that --

2 THE COURT: Okay. I want to be real clear here.  
3 You're saying you had no operator responsibility at these  
4 plants --

07:35:14 5 MR. ROWE: That's correct.

6 THE COURT: -- just owner responsibility?

7 MR. ROWE: That's correct. But I'm not necessarily --  
8 that does not mean I am saying that we were an absentee  
9 disinterested owner. I just don't think the level of what we're  
07:35:23 10 doing, just as it didn't in the refinery, amounts to operator --  
11 it's the same argument in both contexts.

12 So just as you're asking them to be consistent, I  
13 realize I'm fighting to get out of the case in a sense. But let  
14 me put it to you this way: If -- the only reason we're having  
07:35:39 15 this conversation about whether we are or are not -- we, the  
16 government, are or are not an operator of the Plancors is  
17 because some Courts and Exxon's expert use that -- the number of  
18 ways that you trip the CERCLA liability factors as part of the  
19 means of doing allocation.

07:35:57 20 And it sounds to me like you may be interested in  
21 doing it a different way which is the Court's right, privilege,  
22 and --

23 THE COURT: You mean wherever I find equity?

24 MR. ROWE: Right. So if your version of finding  
07:36:12 25 equity does not involve status, we don't have to have this



1 conversation because we owned the plants and we are liable  
2 and --

3 THE COURT: Status is not irrelevant, but I don't  
4 think anybody is going to argue that status alone in a case as  
07:36:26 5 complicated and as multi-factored as this one is going to be the  
6 entire answer.

7 MR. ROWE: If we had time, which we don't, I would  
8 argue to you that even the Courts that purport to use status  
9 don't really use it. They really look at the facts and then  
07:36:38 10 toss status in except in cases where there are big landfills  
11 with, you know, 40 people who are generators. Sometimes that  
12 works.

13 THE COURT: All right.

14 MR. ROWE: Okay. So -- but it is our position that we  
07:36:47 15 were not an operator of the Plancors. And I was just listing.  
16 So we went through pricing provisions.

17 You did not have, if you were a Plancor operator,  
18 the interruptions that I actually didn't mention and should have  
19 about the refineries where the government would send you  
07:37:08 20 telegrams and they would ask you to make this instead of that.

21 Now, you'll see in our briefs that Lincoln  
22 Gordon, the War Production Board vice chairman, says that those  
23 are jaw-boning, those are not -- those telegrams are not legally  
24 binding but they were an annoyance if you were running a  
07:37:27 25 refinery and you had to keep changing what you were doing.

1 That's not happening at the Plancors for the most  
2 part because you're generally making one thing at most of these  
3 Plancors, and you're just making as much of it as you can as  
4 fast as you can.

07:37:36

5 The tradeoff, to some degree, if you're a Plancor  
6 manager -- I don't think this particularly bears on operator but  
7 some people may argue that it would so I'll mention it -- is  
8 that there were fairly -- if not continuous, certainly frequent  
9 amendments to the lease agreements to add additional facilities  
10 to these Plancors. They tended to grow by leaps and bounds  
11 during the war. So while you didn't have to change what you  
12 were doing all the time, you were probably tripping over the  
13 construction crew a lot.

07:37:54

14 If your Honor is satisfied, I am prepared to  
15 stand on my briefs on the agency issue.

07:38:09

16 THE COURT: All right.

17 MR. ROWE: That will save us a little time.

18 THE COURT: Just tell me your best case for saying  
19 there's no agency basis for liability here.

07:38:24

20 MR. ROWE: Let me -- actually --

21 THE COURT: Or there's no agency basis for avoiding or  
22 minimizing liability.

23 MR. ROWE: It's actually -- I think the best answer I  
24 can give you is not so much a case, although we have cases in  
25 our brief, as a couple of examples from the contracts. Here's

07:38:36

1 one from Plancor 1909, the hydrocodimer plant that's in the  
2 middle of the refinery.

3                   This is from the operating agreement. "The  
4 parties now wish to agree upon terms and provisions under which  
07:38:55 5 Humble shall operate the plant for the hydrogenation of raw feed  
6 stocks." Section 1(e) of that agreement says when they're  
7 purchasing feed stocks and equipment, when they're arranging for  
8 transportation, or when they're selling hydrogenated products,  
9 they are in an agency relationship with the government.

07:39:12 10                   Here's what the contract says when it turns to  
11 operation: "In the operation and maintenance of the plant in  
12 the processing of raw feed stocks therein and in the performance  
13 of all other services hereunder, however, Humble shall act as an  
14 independent contractor, it being understood that supplies shall  
07:39:30 15 not have the right to direct the details of such operation but  
16 is interested only in the results obtained therefrom.

17                   I have another example. I won't read you the  
18 quotes from the Baytown Ordinance Works. I'll simply tell you  
19 that there's only one contract there. Plancors have a lease and  
07:39:46 20 an operating contract. This Ordinance Works was the Department  
21 of the Army. They had one contract with three titles.

22                   Title 1 is buying the land. Title 2 is building  
23 the plant where they did not extend, apparently, an agency  
24 relationship. So even the building of that plant was not under  
07:40:02 25 a relationship.

1 Article 3A(2) has a short quote: "Upon  
2 completion of the plant in accordance with the terms of Title 2  
3 hereof, the contractor shall, acting as an independent  
4 contractor, proceed to operate it for the production of toluol  
5 in the quality set forth in this article."

07:40:16

6 THE COURT: All right. That's helpful.

7 MR. ROWE: So, you know, these were -- we sometimes  
8 think that these folks were not sophisticated and they really  
9 were quite sophisticated about what they were doing.

07:40:29

10 I might command to your attention as well that if  
11 you look at the Cadillac Fairview case, which is the Dow plant,  
12 where there is an express agency and an express indemnity  
13 agreement -- this plant is being operated by -- for and at the  
14 risk of the United States Government. When we get to the  
15 contract issue in this case, I may come back to that and remind  
16 the Court that people were sophisticated; and when they wanted  
17 to write an indemnity agreement, they knew how to do it.

07:40:49

18 THE COURT: All right. Well, I think you already have  
19 reminded us. But go ahead.

07:41:00

20 MR. ROWE: Okay.

21 THE COURT: All right.

22 Is the best thing now for you to respond to any  
23 of these points or should we hear from Mr. Lynk?

24 MR. STEINWAY: We have a response, your Honor. It's  
25 whatever the Court wishes.

07:41:11

1 THE COURT: Why don't you briefly respond --

2 MR. STEINWAY: Yes, your Honor.

3 THE COURT: -- confining yourself to what's not in  
4 your brief or simply telling me where to look in your brief.

07:41:22 5 MR. STEINWAY: Your Honor, we have several factual  
6 disputes with some of the points that the Government has made.  
7 I'll just briefly go through them real quickly.

8 THE COURT: All right. That would be helpful.

9 MR. STEINWAY: The Government's point in quoting  
07:41:35 10 Lincoln Gordon from the War Production Board in terms of the  
11 views of the Government and how the government's role was, we  
12 have in our brief, your Honor, several quotes from actual PAW  
13 officials who were there: Mr. Goldsmith and J. Howard Marshall,  
14 the general counsel, whose views were clearly not mixed at all.

07:42:01 15 Their position was very clear: One, they were --  
16 the PAW would be involved in all decisions relating to the  
17 operation of the refineries. And J. Howard Marshall, the  
18 general counsel of the PAW, specifically said that if the -- if  
19 the refinery did not cooperate with the requirements of the PAW  
07:42:22 20 directives, they would lose their allocation and responsibility.

21 We think those are much more persuasive than an  
22 official from the War Production Board who is not at all  
23 involved with the PAW decision-making process. That's point  
24 one.

07:42:42 25 Point two, we have addressed the Government's

1 views about the language on independent contractors in our  
2 briefs. So we will be --

3 THE COURT: Yes.

4 MR. STEINWAY: -- we will just refer you, your Honor,  
07:42:56 5 to the comments on the briefs.

6 I'd like to point out just a couple of things.  
7 In -- you've made mention, your Honor, of Judge Fletcher's  
8 decision in the Ninth Circuit.

9 THE COURT: Yes, sir.

07:43:12 10 MR. STEINWAY: I think Judge Fletcher's decision has  
11 two key points in it that are very, very important. The first  
12 point is in his discussion of avgas production background, Judge  
13 Fletcher says, "Because avgas was critical to the war effort,  
14 the United States Government exercised significant control over  
07:43:31 15 the means of its production during World War II."

16 And my personal view, your Honor, is if Judge  
17 Fletcher would have had the record that Exxon has developed in  
18 this case, he would have included a lot more facts  
19 substantiating control over the facilities; and I'd just like to  
07:43:50 20 point out one example. And that's from Demonstrative Number 12  
21 on the telegrams.

22 We've had a lot of discussion this afternoon,  
23 your Honor, about the telegrams; and I happen to think this  
24 quote from the telegram is very clear. This is a telegram to  
07:44:09 25 the refineries; and basically, what it says is "From the total

1 input, you should extract maximum quantities of whichever of the  
2 following projects are produced at your plant."

3 I mean, that is about as directive and as  
4 affirmative and as mandating as I believe, your Honor, you could  
07:44:30 5 -- you could ever have. So we haven't talked too much -- and  
6 our view, your Honor, is if Judge Fletcher would have had more  
7 of these facts that have been developed by Exxon and referred to  
8 in our papers, that would have even further substantiated the  
9 positions on control.

07:44:50 10 THE COURT: All right. That's a fair point.

11 MR. STEINWAY: The point the Government raised about  
12 rationing and -- steel during the war, your Honor, our view is  
13 that's really not relevant. This was not a rationing, this was  
14 a directive. The government directed us to make something.

07:45:12 15 They didn't ask for a rationing of materials or supplies, they  
16 told us at our plants to make a product. So we don't really  
17 view this as a rationing exercise.

18 I wanted to just mention, your Honor, a point  
19 about the contracts and a question of whether or not everything  
07:45:31 20 that was required by Exxon was embodied in these contracts, the  
21 Defense Supply Corporation contracts.

22 We see the contracts as really a codification of  
23 government responsibilities. It was a contract that was  
24 formalized, cobbled together very quickly by a DSA person to  
07:45:53 25 effectuate their responsibilities as the purchasing arm of the

1 government during the war.

2 But it was really a codification. There are many  
3 requirements that aren't included in these contracts that Exxon  
4 or Humble or the predecessors had to comply with. The telegrams  
07:46:08 5 are one good example. Another example is the planned blending  
6 program. That was not included as any contractual provision or  
7 requirement. This was an independent additional requirement.

8 We see the -- we talked a lot about the  
9 regulatory program; and the Government's made the point that if  
07:46:26 10 we extended this to the extreme, there would be PRPs across the  
11 country as a national -- as a national regulator.

12 Well, if you take a look, your Honor, at the  
13 Brighton decision -- and indeed, the Brighton decision, the  
14 paragraph we have in our demonstrative, the first sentence says,  
07:46:45 15 "And the FMC case is instructive in terms of helping us to  
16 fashion the macro-management test, the extensive regulatory  
17 test."

18 This is far more than just a national regulatory  
19 program. That was just the tip of the iceberg. This was a much  
07:47:00 20 more detailed effort. The government -- there was a wartime  
21 situation. The government told us to make as much avgas as we  
22 possibly can no matter what we do, and that's the long and the  
23 short of it. We needed to make avgas as quickly as possible.

24 THE COURT: That's Judge Fletcher's point,  
07:47:19 25 essentially. Right?



1 MR. STEINWAY: And your Honor, Judge Fletcher says at  
2 the end of his decision -- he says at the end of his decision  
3 that this was a -- the clean-up cost of properly seeing as part  
4 of the war effort for which the American public as a whole  
07:47:38 5 should pay. And that's Judge Fletcher's conclusion in the Ninth  
6 Circuit.

7 Your Honor, the Government mentioned a lot about  
8 a number of the cases in terms of governmental control. You  
9 talk about the Rospatch case which is a case where widgets were  
07:47:58 10 being sold by Rospatch. That situation is far different than  
11 our situation. We've talked a lot about how all the cases cited  
12 by the Government are distinguishable on the facts in terms of  
13 the overwhelming accumulation of criteria and substantial  
14 control in this case.

07:48:15 15 Suffice it to say, in Rospatch there was a -- the  
16 government was bidding to have companies submit to sell them  
17 widgets. And certainly, we're not saying that we were bidding  
18 to sell avgas to the United States. The United States was  
19 telling us what to make. It was a wartime situation.

07:48:35 20 And frankly, the more we talk about this, if you  
21 take a look again at the letter about the master separator,  
22 again, the government says, the US Engineer's Office, "The  
23 project, including the separator, appears adequate to end  
24 pollution in the Mississippi River. It is believed that the  
07:48:54 25 urgency of construction is sufficiently necessary for the war

1 effort. The war effort was the effort that generated" --

2 THE COURT: This stuff I've read. So tell me how  
3 you're responding to the facts that were pointed out in the  
4 argument that we heard.

07:49:08 5 MR. STEINWAY: Yes, your Honor.

6 THE COURT: Okay. And I'm happy to consider -- point  
7 me to places in the record, but you don't need to read me the  
8 record.

9 MR. STEINWAY: Yes, your Honor.

07:49:22 10 I think I've covered --

11 THE COURT: Okay.

12 MR. STEINWAY: -- some of the facts.

13 THE COURT: All right. And I appreciate that. I  
14 don't mean to cut you off, but we've heard a lot of detail, and  
07:49:30 15 that's important because it's where the devil lives.

16 MR. STEINWAY: We could go on and on on this.

17 THE COURT: We could but we're not. I think we all  
18 agree on that one.

19 All right. Let me hear from you please,

07:49:41 20 Mr. Lynk.

21 MR. LYNK: Thank you, your Honor.

22 THE COURT: Tell me what Fifth Circuit case controls  
23 this issue.

24 MR. LYNK: Well, I'm going to try to deliver on that  
07:49:51 25 promise.

1 THE COURT: Thank you.

2 MR. LYNK: I think I should point something out as  
3 well: The first part of my argument is going to be assuming  
4 that Exxon is still requesting a joint and several liability  
07:50:04 5 judgment at Baytown and at Baton Rouge. However --

6 THE COURT: You mean that it has no --

7 MR. LYNK: In part -- one way to understand that is  
8 Exxon has no liability. Another is that they are entitled to a  
9 form of relief in which they can wholly collect from the other  
07:50:20 10 liable party even without regard to equitable considerations.

11 We don't think that they're entitled to that  
12 judgment but it may not be clear whether they are still seeking  
13 it given that they do concede they are an operator under wartime  
14 period.

07:50:33 15 THE COURT: Well, perhaps, we can clarify whether the  
16 questions extend that far.

17 MR. BUTHOD: Judge, the basis for joint and several  
18 liability is because it's commingled waste. It's not -- in  
19 fact, frankly, the very first thing the Court said when you came  
07:50:40 20 out a few hours ago, I was a little concerned. It's not based  
21 on the fact that we are not an operator.

22 THE COURT: No, I understand. I understand.

23 MR. BUTHOD: So maybe --

24 THE COURT: So I think you do need to -- they are  
07:50:48 25 seeking that relief but not because of status, if you will.

1 MR. LYNK: That's fine. And --

2 THE COURT: I'm sorry?

3 MR. STEINWAY: We also have not had an opportunity to  
4 talk about some of the other issues like joint and several -- we  
07:50:58 5 focused our presentation on the operator issue.

6 THE COURT: I understand. But your point now is that  
7 you are seeking joint and several liability because the waste is  
8 commingled, not because you don't -- not because you have no  
9 responsibility as an operator. Okay. So you better argue it.

07:51:19 10 MR. LYNK: I think I should stick to my -- the script  
11 I have. I'll start with --

12 THE COURT: No, no. Every good lawyer knows that  
13 scripts are not --

14 MR. LYNK: That was a bit -- yes, that was a bit  
07:51:30 15 facetious. And in fact, the half hour Mr. Rowe talked about,  
16 I'll try to turn that into 20 minutes, if I can.

17 THE COURT: That would be appreciated since I do want  
18 to hear from the other side once you finish talking.

19 MR. LYNK: Sure.

07:51:45 20 Your Honor, I'll start with the bottom line,  
21 10,000-foot view. We think the response to a question you asked  
22 very early on, what should happen in these cases, where should  
23 they go, we think both of these cases, assuming they were timely  
24 filed, should end not with the declaration that the United  
07:52:02 25 States is jointly and severally liable --

1 THE COURT: For Baytown?

2 MR. LYNK: For either side. Baytown or Baton Rouge.  
3 -- not jointly and severally liable because we don't think that  
4 that form of relief is a form of relief available to a PRP, an  
07:52:17 5 admitted PRP, for the wartime period, at least, as an operator.

6 It should end instead with a judgment of each  
7 parties' several liability and an allocation between those  
8 parties applying equitable considerations as the Court is  
9 authorized to do by Section 113(f).

07:52:34 10 THE COURT: And the commingling?

11 MR. LYNK: Commingling in this context, where the suit  
12 is brought by a PRP against a PRP, essentially, has no  
13 relevance. Let me explain that a bit. Let me -- let me explain  
14 that a bit.

07:52:49 15 THE COURT: All right.

16 MR. LYNK: You could have -- you have actions under  
17 107(a) (4) (A) brought by the United States, a state, a tribe in  
18 its enforcement capacity. In that capacity, none of those  
19 entities are PRPs. They, in appropriate cases, may be entitled  
07:53:07 20 to a judgment of joint and several liability. That is a form of  
21 relief with roots in the common law, as the Supreme Court has  
22 described it in Burlington Northern.

23 And the common law theory was an innocent  
24 plaintiff harmed by multiple tortfeasors should not be put at  
07:53:23 25 risk of failing to recover for their injury, if they prove it,

1 simply because some parties are no longer reachable, insolvent,  
2 no longer there, and the other co-tortfeasors point to those  
3 absent parties and say, "Well, they were responsible. He was  
4 responsible. They were the proximate cause."

07:53:40

5 Joint and several liability was a way to shift  
6 the risk away from the innocent plaintiff to those  
7 co-tortfeasors and to say, "You're all going to be joint and  
8 severally liable if this claim is proven and then it's up to you  
9 to show the Court how it should allocate amongst you based on  
10 your comparative fault."

07:53:57

11 That scheme, essentially, has been imported into  
12 CERCLA; and in the CERCLA statutory scheme, again, a government,  
13 state, tribe in its enforcement capacity or an innocent party --

14 THE COURT: We don't have any tribes here.

07:54:13

15 MR. LYNK: Right, we don't. -- or an innocent party,  
16 somebody that has not contributed to the harm but for whatever  
17 reason has incurred potential response costs, they are the party  
18 that is most closely in the shoes of the innocent plaintiff  
19 under the theory at tort.

07:54:28

20 And in those situations, joint and several  
21 liability may be appropriate, although, even then, as the  
22 Supreme Court held in Burlington Northern, it is not always.  
23 This, however, is a case between PRPs; and this is where the  
24 Fifth Circuit precedent comes into play.

07:54:46

25 Elementis Chromium cited in our brief -- and this

1 is one instance where I'm going to quote the holding, although I  
2 try not to do that too often -- made the following statement,  
3 part of which was overruled by ARC, part of which has not been,  
4 "When one liable party sues another liable party under  
5 CERCLA" --

07:55:01

6 THE COURT: Can I ask for clarification?

7 MR. LYNK: Yes.

8 THE COURT: Are you reading only the part that was not  
9 overruled?

07:55:06

10 MR. LYNK: I will read only -- well, I think it will  
11 become clear why this is still good law if I read the whole  
12 sentence.

13 THE COURT: Okay.

14 MR. LYNK: Does that make sense?

07:55:13

15 THE COURT: Not yet.

16 MR. LYNK: The sentence was this: "When one liable  
17 party sues another liable party under CERCLA, the action is not  
18 a cost recovery action under Section 107(a) and the imposition  
19 of joint and several liability is inappropriate."

07:55:27

20 Now, we know after ARC that when a party has  
21 incurred costs as Exxon has done at Baton Rouge, for example,  
22 but where it does not have a remedy available under 113(f), no  
23 prior action under 106, 107, no settlement that qualifies under  
24 (f) (3) -- 113(f) (3) (B), nothing that would make 113(f) directly  
25 applicable, we know that those parties, yes, can bring a claim

07:55:56

1 under 107(a).

2                   However, ARC did -- expressly did not decide  
3 whether such a claim would provide for joint and several  
4 liability. So in this circuit, at least, the holding in  
07:56:08 5 Elementis Chromium on that point is still good law; that if this  
6 is an action between liable parties, imposing joint and several  
7 liability is inappropriate.

8                   And now in our brief we have explained more about  
9 why that's so. We've talked about the common law principles  
07:56:24 10 again that I've summarized here. I won't belabor those points.  
11 But I will note that -- but I will note that the description  
12 I've just given about why -- about how this is rooted in common  
13 law and why, therefore, joint and several liability makes sense  
14 in some cases but not others, that has been part of the Fifth  
07:56:44 15 Circuit's jurisprudence since Bell Petroleum cited in our brief.

16                   And in 2009 when the Supreme Court issued the  
17 Burlington Northern opinion, it agreed with this understanding  
18 of where joint and several liability came from and how it's  
19 relevant under CERCLA. In fact, it cited very favorably the  
07:57:01 20 Fifth Circuit cases on that point.

21                   So we think, again, the Elementis Chromium  
22 statement that the imposition of joint and several liability is  
23 inappropriate in an action between liable parties is still good  
24 law and we think that that is true whether or not you refer to  
07:57:18 25 Exxon's claim as a cost recovery action.



1           It may be a cost recovery action, but it is still  
2 one brought by a liable party against another liable party.  
3 Therefore, it must only be for several liability and it is  
4 subject to equitable allocation as Congress intended.

07:57:36 5           All right. I will also make two additional  
6 points about why the common law roots are important and also why  
7 it's important to be clear about the nature of the liability  
8 that Exxon can obtain, and that is, that -- that if the Court  
9 were to construe their action as one genuinely for joint and  
07:57:57 10 several liability, it confuses the burden of proof in  
11 allocation.

12           I say that because when I read Exxon's reply  
13 brief, they appear to be asserting that in Phase 1 of this case,  
14 the liability and allocation phase, the US must prove that a  
07:58:14 15 reasonable basis for apportionment exists under Burlington -- or  
16 as was set forth in Burlington.

17           Here's the problem with that: Burlington, again,  
18 was an enforcement claim under 107. So the Defendants in that  
19 enforcement action, yes, have the burden to prove a reasonable  
07:58:35 20 basis for apportionment or else they would be jointly and  
21 severally liable for EPA's costs; and then they would have to go  
22 on and deal with allocation amongst themselves.

23           This is not that type of case. Not an innocent  
24 Plaintiff, not an enforcement claim. It's a claim between  
07:58:52 25 liable parties. In that setting, the Court can allocate based

1 on equitable circumstances and whatever equitable factors it  
2 deems appropriate under the facts of the case.

3 And it is not either parties' burden to prove,  
4 for example, the visibility of harm there. We might elect to  
07:59:09 5 make the attempt. We might elect to say that there is a portion  
6 of one of these sites or the other of these sites that is so  
7 distinguishable from the rest that it is, in fact, only their  
8 harm.

9 But we're not obligated to do that. All we have  
07:59:23 10 to do is make our case for equitable allocation. They would  
11 make their case. And the Court would have the equitable -- have  
12 the discretion to decide what is equitable under these  
13 circumstances. So that's an important point.

14 The other is the treatment of orphan shares, the  
07:59:36 15 shares associated with a party that may have contributed to the  
16 harm but is no longer reachable. Now, that --

17 THE COURT: We don't have that in this case. Why are  
18 we worrying about that if it's not even present?

19 MR. LYNK: The past costs, I would agree with that  
07:59:53 20 statement. I don't think within the Baytown Complex or within  
21 the Baton Rouge Complex, in general, that there are any third  
22 parties we have to worry about.

23 However, at both of these sites, part of what  
24 Exxon is seeking is a declaration of future cost liability for  
08:00:09 25 unknown costs of dealing with something that might be in any one

1 of these water bodies adjacent to these sites. We don't know  
2 yet if they'll have to do something there, when they'll have to  
3 do it, what it will cost, what contamination it will be dealing  
4 with.

08:00:20 5 THE COURT: My understanding is that they're looking  
6 for an allocation decision, not "You pay this dollar amount,"  
7 "You pay that dollar amount," "You pay this dollar amount."  
8 It's a formula that would apply and enable the parties to --  
9 when the costs are incurred, when they are known to know how  
08:00:42 10 much their respective shares would be. Am I understating what  
11 they are asking?

12 MR. LYNK: That -- in theory, that should be it. And  
13 obviously, we briefed -- we've stated our position in our briefs  
14 about why we think the Court shouldn't reach that yet even for  
08:00:58 15 allocation purposes but let --

16 THE COURT: Can I ask one other question? You've also  
17 asked in the alternative that if I do reach that, I leave open  
18 kind of a safety valve that says -- or an escape hatch that says  
19 if the factual basis for the Court's allocation formula turns  
08:01:16 20 out as the costs are incurred to have been significantly flawed  
21 in a way that leads to the -- should lead to a revision of the  
22 allocation itself, then you should leave open the possibility of  
23 allowing the United States to move for that or Exxon?

24 MR. LYNK: That is another possible resolution; and if  
08:01:41 25 I may -- although there is not a clock in front of me --

1 THE COURT: Can I --

2 MR. LYNK: Sorry.

3 THE COURT: Can I just briefly turn to opposing  
4 counsel and say if that window was opened, would you protest?

08:01:52 5 MR. STEINWAY: We would totally agree with that, your  
6 Honor. In fact, that's very consistent with the Boeing case.

7 THE COURT: It's also real consistent with equity  
8 which is driving the entire inquiry.

9 MR. STEINWAY: And we also felt, your Honor, that also  
08:02:04 10 would be a proper issue for Phase 2. We see that more as a  
11 recoverability or a new fact issue.

12 THE COURT: Right.

13 MR. STEINWAY: And Exxon's position on this has always  
14 been we would like to bring some certainty; and certainly, if  
08:02:15 15 there's an egregious error or some erroneous fact or some  
16 assumption, we would certainly ask the Court to revisit the  
17 situation.

18 THE COURT: Isn't that the better approach than simply  
19 punting entirely and saying I don't have enough information even  
08:02:29 20 to set a -- based on what's already been incurred, even to set  
21 an allocation structure that would apply not only  
22 retrospectively but prospectively subject to the possibility  
23 that things will change as events and costs develop in a way  
24 that should lead to significant revision? Why isn't that the  
08:02:58 25 better way to do it?

1 MR. LYNK: May I defer to my colleague on that  
2 question --

3 THE COURT: Sure.

08:03:04

4 MR. LYNK: -- and let's say reserve two minutes of my  
5 time?

6 THE COURT: Hold that thought --

7 MR. LYNK: That's fine.

8 THE COURT: -- and you can keep going and we'll come  
9 back to that.

08:03:09

10 MR. LYNK: But I will just say this: that it does  
11 still matter, though, thinking about those future costs, that  
12 the Court be clear that Exxon's action must be limited -- must  
13 be an action for several liability; and the reason is if these  
14 water bodies ultimately do entail contributions from other  
15 parties and if we find later that those parties aren't  
16 reachable, the effect of the joint and several liability  
17 judgment against Defendants is that they are stuck with any  
18 orphan shares.

08:03:28

19 So part of the reason in the cases -- in the  
20 enforcement 107 cases or cases brought by an innocent party,  
21 part of the reason that you may go through the exercise of  
22 apportionment first before those liable parties, then allocate  
23 is because the orphan shares rest with the Defendants in that  
24 context unless they prove that they should be apportioned. And  
25 then and only then do they escape liability for them.

08:04:03

1                   Whereas, in an action between liable parties  
2 where it is clear that it is simply a matter of equitable  
3 allocation, then the Court has the discretion to allocate not  
4 just the known costs amongst those who are still reachable but  
08:04:20 5 also to allocate the orphan shares.

6                   So we then, as the United States, are not forced  
7 to meet a burden of proof that shouldn't apply in the  
8 apportionment context simply to escape those shares. So that is  
9 the other reason why it's important to be clear that Exxon's  
08:04:36 10 action is one for several liability as we believe Elementis  
11 Chromium holds.

12                   So I'll move on now to the second issue which is  
13 whether Exxon's (f) -- 113(f) (3) (B) contribution remedy is  
14 exclusive with respect to Baytown; and this is only an issue --

08:04:56 15                   THE COURT: This is only at Baytown.

16                   MR. LYNK: -- only at Baytown.

17                   And here, unfortunately, I cannot promise you  
18 controlling Fifth Circuit law for the most part.

19                   THE COURT: So what's your best case and what's your  
08:05:08 20 worst case?

21                   MR. LYNK: Well, we start with this: Unlike some of  
22 the -- many of the cases -- and I would venture to say most --  
23 that Exxon has cited in its brief, this is not a case in which  
24 the parties are disputing that the agreed orders that they  
08:05:21 25 showed us in their handout -- I think that was the first tab

1 that described the two facility operation areas governed by  
2 those orders.

3 No one is disputing that those orders qualify as  
4 administrative settlements for purposes of a contribution remedy  
08:05:36 5 under 113(f) (3) (B); and if there was any dispute about that,  
6 obviously, I could address it. But Exxon's opening motion  
7 pointed to the same case we would recommend to your Honor as the  
8 leading authority on this now, which is Trinity in the Third  
9 Circuit.

08:05:50 10 I believe we also described how the Second  
11 Circuit's Niagara Mohawk decision, as well, is largely in accord  
12 with Trinity. We are aware, obviously, that you yourself have  
13 had a case in the past, Differential Development, in which you  
14 reached a different decision. I'll point out to you that  
08:06:10 15 factually that case was different because it involved a  
16 voluntarily agreement --

17 THE COURT: Yes.

18 MR. LYNK: -- not binding on anyone.

19 THE COURT: Appreciate that difference.

08:06:20 20 MR. LYNK: So we don't think that that would control  
21 here, those facts aren't present.

22 Now -- now, when you talk about -- now, then that  
23 means --

24 THE COURT: Is my case your worst case?

08:06:32 25 MR. LYNK: Well, I don't think it is because, again, I

1 do think it's readily distinguishable. Con Ed, Second Circuit,  
2 was one that I believe you discussed in that opinion; and that  
3 also involved a voluntary agreement; and I'll point out that  
4 Niagara Mohawk had certainly, at least, suggested that, to the  
5 extent Con Ed reflected a very narrow look at what settlements  
6 could qualify that they had to release CERCLA liability, Niagara  
7 Mohawk was moving away from that.

8 Niagara Mohawk was an administrative order that  
9 was certainly not an order under the two types of CERCLA  
10 authority that are referenced, for example, in Section  
11 113(g) (3) (B). So in that respect, we don't think Con Ed  
12 represents the current state of the law even in the Second  
13 Circuit; and we don't think you should follow it here.

14 Now, to the extent that there is a remedy under  
15 (f) (3) (B) we argue that you don't have a choice. So I'm going  
16 to put aside for a second the question of whether these agreed  
17 orders cover all the costs at Baytown. I'll get to that. But  
18 obviously, they cover some of the costs. There's no doubt about  
19 that.

20 To the extent that that remedy is available, it's  
21 exclusive; and on that issue, we think the Supreme Court case  
22 law controls. ARC specifically in its opinion said that -- made  
23 clear that the remedies under 107 and 113, while they may have  
24 some conceptual overlap, are distinct claims; and a PRP can't  
25 simply choose one over the other as a means of getting to joint



1 and several liability.

2 If 113(f) is available, they have to use it.  
3 That's clear under ARC and it's clear under other case law that  
4 we cited. And we think -- and generally, although I won't spend  
08:08:26 5 too much time talking about the specific cases Exxon cited in  
6 their reply but I think for the most part you're going to find  
7 that where they allowed the Plaintiff to proceed under 107(a),  
8 it was not because they thought the Plaintiff is free to choose  
9 either one. Generally, it was because they felt 113 hadn't been  
08:08:44 10 triggered.

11 So under the various facts of those cases, they  
12 felt that the settlement wasn't a qualifying settlement; but if  
13 it was, 113(f) was exclusive; and that was true even in the  
14 Bernstein decision which is discussed a fair amount in the reply  
08:08:58 15 brief. That was the Seventh Circuit. And I'll talk -- and I'll  
16 stop for a moment and talk a little bit about that case because  
17 it shows a factual distinction from these orders.

18 Bernstein involved two successive administrative  
19 orders on consent signed with EPA, and it was a form that the  
08:09:17 20 EPA has commonly used at many sites. The first order provided  
21 for the preparation of an engineering evaluation and cost  
22 analysis which is, basically, the study you use to identify  
23 proposed remedial -- removal, excuse me, alternatives. So they  
24 did an order that provided for this study to be done. That's  
08:09:38 25 not the end of the cleanup.

1                   Later, a second order was signed and that order  
2 provided for the company to actually go out and do the removal  
3 that EPA had selected and then meet the final cleanup  
4 objectives. So then what happens in this case is that the Court  
08:09:54 5 says, "Well, both of these orders involve a covenant that's  
6 conditional." In other words, there's no -- in that Court's  
7 conclusion, there was no resolution until the end of the  
8 cleanup.

9                   And as I've described it, the first order covered  
08:10:10 10 a part of the cleanup. The second order covered the rest.  
11 Because the condition had been satisfied under the first order,  
12 the Second Circuit held that that one at least was a qualifying  
13 settlement; and it decided that that claim was time barred under  
14 either of the potentially applicable statutes of limitation  
08:10:28 15 which I haven't come to yet.

16                   The second order, the condition hadn't been  
17 satisfied yet; and so it was for that reason that the Second  
18 Circuit held, okay, this is not a qualifying settlement. That  
19 means 113 hasn't been triggered for these costs. And that means  
08:10:44 20 107(a) by default is the claim.

21                   The facts present there that lead to that outcome  
22 aren't present here. These agreed orders, as I read them -- and  
23 I could go through the provisions of them in more detail if it  
24 were helpful -- they do not make the resolution of the  
08:11:03 25 settlement -- the resolution of liability contingent.

1 In fact, in the March, 1995, agreed order, there  
2 is a provision that does make one express reservation criminal  
3 liability; but that would, obviously, suggest that everything  
4 else is resolved. And actually, I think it is worth citing the  
5 page of that.

08:11:23

6 So what I'm looking at -- and I'm not going to  
7 cite a Bate's numbered page, I'm going to cite an original  
8 number. But I think this will appear when you look at the  
9 actual copy of the agreed order which is one of Exxon's exhibits  
10 with its opening motion.

08:11:47

11 So there is on pages 40 to 41 of the May --  
12 excuse me, March, 1995, agreed order -- and this is in paragraph  
13 24 -- a statement: "It is understood and agreed that acceptance  
14 of the terms of this settlement agreement confirmed by signature  
15 hereto does not in any way release Exxon officers, agents,  
16 et cetera, from any federal criminal liability arising out of  
17 the same conduct this agreement addresses." That's the only  
18 reservation; and by obvious implication, it suggests that, at  
19 least, as to civil this was a resolution.

08:12:12

20 And I will just mention without reading them all  
21 a few other provisions that we think also support that. The  
22 first page of the order in the last paragraph on that page, we  
23 believe there's language that supports the reading of this as a  
24 resolution of liability.

08:12:30

25 On page 9 there is additional language in the

08:12:51

1 first full paragraph on that page -- actually, the first  
2 sentence of that paragraph where it says it resolves matters  
3 raised in all of the proceeding notices of violation and on page  
4 41, paragraph 27, where it says "This order dispenses with all  
08:13:16 5 claims and allegations set forth in the executive director's  
6 original petition against Exxon."

7               So we think all of these provisions read as a  
8 whole indicate that this was a resolution of liability. And we  
9 think it's distinguishable factually from those cases Exxon has  
08:13:33 10 cited in which agreements were held not to qualify. There is --  
11 there is a case Exxon has cited, ITT Corp from the Sixth  
12 Circuit -- and it appeared in our brief as well -- in which one  
13 of the things that the Court did was find that it narrowly read  
14 -- or restrictively, let's say, read the language in the  
08:13:58 15 (g) (3) (B) statute of limitations which refers to certain types  
16 of settlements and said, well, we think this means that only the  
17 listed types of settlements are the ones that qualify and give  
18 rise to a contribution remedy.

19               That case, even within that circuit, is  
08:14:12 20 questionable authority because of a decision earlier in RSR  
21 Corporation; and because this is, I think, the only case we are  
22 mentioning today that's not cited in the briefs, I'm going to  
23 read the citation for it. I may have to search for it, but I'll  
24 make my point while I'm looking for the citation.

08:14:34 25               RSR Corporation, to the contrary, held that --

1 that read as Aviall did the companion provisions 113(f) and  
2 113(g) as sort of universal -- universal provisions regarding  
3 the contribution right and the statute of limitations that  
4 applies to it.

08:14:54 5 So in other words, where RSR Corporation came out  
6 was that the statute of limitations in 113(g) (3) applies to any  
7 settlement of -- of some or all of the costs of a response  
8 action and provides the statute of limitations for that claim.  
9 RSR Corporation is 496 F3d 552, Sixth Circuit, 2007. And  
08:15:19 10 because it came before ITT, arguably, it's the controlling  
11 decision. In any event, neither of them are a Fifth Circuit  
12 decision and we would refer the Court initially, as we've cited,  
13 to Trinity, the same case Exxon has recommended.

14 THE COURT: All right, thank you.

08:15:35 15 MR. LYNK: Now, let me get to the factual question of  
16 are all the costs after these orders signed -- were signed  
17 encompassed within those orders? And that will lead me to what  
18 about any costs Exxon incurred beforehand.

19 So after 1995 our reading of these orders as  
08:15:53 20 their own terms and how Exxon described them in the allegations  
21 of its complaint and in its opening motion is that they provide  
22 comprehensively between the two of them for the clean-up  
23 activities that Exxon is conducting at Baytown to this day.

24 I'm going to leave aside the question of whether  
08:16:14 25 they also provide for the water bodies because, again, we've

1 argued that they haven't done anything there yet. They may, at  
2 least, to some degree, disagree with that characterization. But  
3 at least if you're talking about the Baytown Complex where all  
4 the past costs, for the most part, have been incurred, we see  
08:16:30 5 nothing in this factual presentation to the Court that suggests  
6 anything other than the conclusion they're comprehensive.

7 And in the reply brief, I -- the only suggested  
8 costs outside the scope that I recall is a reference to Exxon's  
9 negotiations to establish the FOAs, the facility operations  
08:16:53 10 areas. But on its face to us, that just sounds like further  
11 discussions with the state about implementing these agreed  
12 orders.

13 These agreed orders by their terms provide for  
14 Exxon to address all of the soil contamination that it finds in  
08:17:10 15 its investigations, to address all groundwater pollutants,  
16 including pollutants that may be identified after the date the  
17 order is entered.

18 It makes clear that -- what the goals of the  
19 cleanup are, and it provides for the order to be terminated  
08:17:24 20 after those goals are met. There is nothing partial about this  
21 order. So we don't think that there is any credible evidence  
22 here that any costs since 1995 are somehow outside the scope.

23 And that's why we would say the (f) (3) -- the  
24 113(f) remedy is exclusive for those costs, and the statute of  
08:17:43 25 limitations applicable to that claim is also exclusive for those

1 costs.

2 Now, costs prior to 1995. Exxon has argued,  
3 well, these are things we did voluntarily before we signed these  
4 orders. We can still sue under 107. That is the point -- and  
08:17:59 5 in part, because we didn't understand that that precisely is the  
6 argument until now. That is the point on which we submitted  
7 case law to your Honor's attention in our notice of supplemental  
8 authority, and I will be the first to say that at that point  
9 you're looking at pretty much nothing but district court  
08:18:15 10 opinions and only a few of them because most Courts have yet to  
11 reach this precise issue.

12 But we think that -- we do refer you to the  
13 Whittaker case and the Appleton case, and we think their logic  
14 is persuasive. And although both of those cases ultimately  
08:18:32 15 dealt with 113(f)(1) specifically, the during or following a  
16 civil action contribution remedy, we think the same rationale  
17 should apply if you're talking about entry into an order that's  
18 comprehensive for a site.

19 And so we believe those cases are precedent for  
08:18:50 20 finding that all of the costs incurred to date at the Baytown  
21 site are subject to an exclusive 113(f)(3)(B) remedy. And I'll  
22 just -- again, just to reinforce this point, while that  
23 particular facet of the problem may not have been addressed yet  
24 by many Courts, what you do about previously incurred costs, it  
08:19:10 25 is definitely clear that when this remedy is available, it's the

1 exclusive remedy. That is clear. There just haven't been that  
2 many cases that have pursued that issue that far into the  
3 details yet.

4 Now, the last issue that I'm assigned to talk  
08:19:23 5 about is which statute of limitations applies. And --

6 THE COURT: Is this only a Baytown issue?

7 MR. LYNK: Again, it's only a Baytown issue. We've  
8 not raised the statute of limitations issue with respect to  
9 Baton Rouge and we are not suggesting that the (g) (3) statute of  
08:19:39 10 limitations applies to the 107 claim at Baton Rouge, but we are  
11 suggesting that it applies to the --

12 THE COURT: This is the 113 claim?

13 MR. LYNK: Yes, 113(f) claim at Baytown.

14 And our argument is based on Aviall. So, again,  
08:19:57 15 this is a controlling law issue, we would say; and it's based on  
16 Aviall's analysis of 113(f) and 113(g) because Aviall looked at  
17 those provisions side by side and said it seemed pretty clear  
18 that 113(f) was intended to set forth the contribution remedies  
19 Congress intended to put in the statute in 1986 and that 113(g)  
08:20:24 20 was written to provide corresponding statute of limitations for  
21 each of those contribution remedies.

22 And even though, again, (g) (3) (B) has this odd  
23 quirk where it lists certain types of settlements, Aviall, when  
24 it described these provisions, did not seem to put any weight on  
08:20:42 25 that characterization. Rather, it seemed to suggest that (g) (3)



1 was quite simply the universal statute of limitations for  
2 contribution actions under CERCLA.

3 And the cases we've cited since Aviall are cases  
4 that have read Aviall for this very point and have suggested  
08:20:58 5 that it controls and that that is the reason you would apply the  
6 statute of limitations in (g) (3) (B) to a contribution claim.  
7 Whether -- (g) (3), I should say. Whether it arises as a during  
8 or following contribution claim or an administrative settlement  
9 contribution claim, either way, (g) (3) applies the statute of  
08:21:17 10 limitations.

11 In terms of cases that Exxon has cited in its  
12 reply, again, I'm not going to go at length about them; but  
13 almost exclusively what they are referring to are cases decided  
14 before Aviall; and because of that, they are no longer good law  
08:21:33 15 on this point; and that includes Geraghty & Miller, the Fifth  
16 Circuit decision that they've cited.

17 And in fact, Geraghty & Miller relied on a theory  
18 that used to carry some weight with a fair amount of Courts,  
19 which was this: that 113 and 107 are really different sides of  
08:21:52 20 the same claim and that 113 was just another form of cost  
21 recovery. And so there were Courts, including Sun Company,  
22 which, I believe, was the first, that said, well, therefore,  
23 there are instances in which a contribution claim can serve as  
24 the initial action for purposes of the (g) (2) statute of  
08:22:10 25 limitations.

1 That theory and that way of looking at CERCLA  
2 ended with Aviall because Aviall said, no, these are distinct  
3 claims; and ARC totally agreed with that in a different context  
4 and carried it even further, explained it further, but said  
08:22:24 5 again these are distinct remedies available in different  
6 procedural circumstances.

7 So any case that relies on that rationale to  
8 apply the (g) (2) statute of limitations is no longer good law  
9 after Aviall and ARC. And in terms of -- again, in addition to  
08:22:42 10 the district courts we've cited, we can refer you to the Sixth  
11 Circuit decision I mentioned earlier, RSR Corporation, on this  
12 point; Niagara Mohawk, 596 F3d at 128, Note 19; and the Eighth  
13 Circuit's decision in Morrison Enterprises, 638 F3d at 609. All  
14 are cases that find that (g) (3) is the universal statute of  
08:23:10 15 limitations for contribution actions.

16 And I'll -- and I'll conclude with one final  
17 point about the statute of limitations. We don't think your  
18 Honor should conclude or can that there is no statute of  
19 limitations applicable here. That's been one of Exxon's  
08:23:24 20 arguments; and we think that that would be the wrong answer,  
21 whether or not the Defendant was the United States or a private  
22 party.

23 But because the Defendant is the United States,  
24 it's particularly problematic because there's no waiver of  
08:23:38 25 sovereign immunity for a time unlimited claim that can be

1 brought at any time in the future. So we think that if there  
2 was a default position, it would have to be the general federal  
3 statute of limitations that we cited in our brief. And we  
4 pointed out that the claim would still be time barred even under  
5 that statute.

08:23:55

6 THE COURT: All right.

7 MR. LYNK: Thank you, your Honor.

8 THE COURT: Thank you.

9 MR. STEINWAY: We can start with the strict liability

08:24:04

10 -- the joint and several liability and then the statute of  
11 limitations arguments.

12 THE COURT: That's fine.

13 MR. BUTHOD: The only thing I was going to say, Judge,  
14 is we'll follow the Court's instruction. We're grateful --

08:24:14

15 there's a lot that just came up that we need to address. We're  
16 grateful for the Court and most grateful for the court's staff.

17 THE COURT: The court reporter is really the one we  
18 ought to be thanking here.

19 Do you need a break, Gayle, or can we --

08:24:20

20 THE COURT REPORTER: No, I'm fine. Thank you.

21 THE COURT: All right.

22 MR. STEINWAY: I know how hard you've been working  
23 before any of us even got here. I appreciate that.

24 We'll address the best we can the 107, 113

08:24:31

25 interplay and limitations.

1 Frankly, your Honor, we're concerned about the  
2 time that it's going to take us to reply to these issues; and  
3 we've also asked in our briefing papers for the opportunity,  
4 given the page limitations, to have an opportunity to further  
5 brief --

08:24:44

6 THE COURT: I'll give you another 20 pages on these  
7 points. That's a lot. It's a huge amount.

8 MR. STEINWAY: Thank you, your Honor.

9 THE COURT: But that should limit your presentation  
10 here this evening to the highpoints that you really want to make  
11 sure that I don't walk away thinking you don't dispute, okay?  
12 But I think you can limit yourself to that for now.

08:24:52

13 MR. STEINWAY: Thank you, your Honor.

14 MR. LYNK: Your Honor, if I can add one thing, just  
15 one?

08:25:08

16 THE COURT: Yes, sir.

17 MR. LYNK: First of all, of course, that we were -- I  
18 was already prepared to say we would be fine; and obviously, you  
19 granted a supplemental brief. I mentioned earlier that we don't  
20 think factually in terms of what's presented here, including in  
21 their reply, that there's any reason to suggest that there are  
22 costs outside the scope.

08:25:18

23 But we are at an inherent disadvantage when we  
24 talk about the facts relating to what they're doing in their  
25 response actions because in this case we bifurcated costs and

08:25:33

1 NCP compliance issues to Phase 2. And in fact, when we issued  
2 certain discovery requests that asked targeted questions about  
3 the nature of the response actions, for example, whether actions  
4 were removals or remedials or both, we did not get an answer.

08:25:55

5 And we discussed that. And we ultimately  
6 stipulated to expressly reserve that in the Phase 2, which  
7 already seemed to be the proper reading of your scheduling  
8 order. So the problem now is if there are factual issues that  
9 they would raise that suggest, well, this is -- this is how the  
10 cleanup is being conducted and this is why certain things are  
11 outside the scope, they would be issues on which we never had a  
12 chance yet to take discovery.

08:26:12

13 Now, we think the motions can be resolved at this  
14 point without speculating about whether there are costs outside  
15 the scope because we think if you look at all the filings to  
16 date, there's no basis to reach any other conclusion as a matter  
17 of fact. And of course, again, in our arguments about the  
18 statute of limitations, we've not asked the Court to enter a  
19 summary judgment on that basis --

08:26:26

08:26:38

20 THE COURT: I understand that.

21 MR. LYNK: -- only to deny.

22 So I'm not suggesting that we definitely need to  
23 have discovery but I would say if there are further --

08:26:48

24 THE COURT: You're not seeking affirmative summary  
25 judgment, you simply don't want me to grant theirs?

1 MR. LYNK: Exactly.

2 THE COURT: Okay. Then I think that simplifies and  
3 clarifies, and I appreciate your reminding us of that.

4 MR. LYNK: Thank you.

08:26:57 5 THE COURT: All right, thank you.

6 Go ahead.

7 MR. STEINWAY: Your Honor, we will address the joint  
8 and several liability question first. First, we think our  
9 motion for imposing joint and several liability is proper. The  
08:27:13 10 Government has admitted all of the prima facie elements of a 107  
11 claim except for the question of the covered party issue. The  
12 fundamental prima facie elements of facility, hazardous  
13 substance, release, and occurrence of response costs have all  
14 been admitted.

08:27:31 15 You asked us for the precedent for granting or  
16 imposing joint and several liability. Not only has BNSF, the  
17 Supreme Court precedent, but here in the Fifth Circuit, In Re:  
18 Bell Petroleum Services specifically said that 107(a) can  
19 provide a basis for -- a 107(a) claim can provide a basis for  
08:28:01 20 the imposition of joint and several liability.

21 Here even in this Court, your Honor, you, in the  
22 Differential Development, a 1994 case, or the Halliburton Energy  
23 Services case, have recognized that a 107 claim can result in  
24 the imposition of joint and several liability.

08:28:21 25 Our factual basis is again not only the

1 commingling of the waste resulting in an individual --  
2 indivisible harm but also the fact that the facilities were  
3 integrated. So not only do you have an indivisible waste  
4 between the United States and Exxon but you have a temporal  
08:28:40 5 issue as well. So we feel that the imposition of joint and  
6 several liability is proper.

7 We believe the Court wrestled with this issue in  
8 the Halliburton Energy Services case that we set out. In fact,  
9 in a page of your decision, your Honor, you talked about the  
08:28:58 10 question of Halliburton Energy Services and Georgia Pacific and  
11 the procedural status of that case and the imposition of joint  
12 and several liability in that context.

13 We think that our situation here is far different  
14 than the situation that faced the Court in that case. The  
08:29:16 15 difference is as follows: Georgia-Pacific conceded liability in  
16 the Halliburton Energy Services case. And so because of that  
17 concession of liability, the Court looked at the questions of  
18 blunting and et cetera and moved forward.

19 Here, however, in contrast, the Government has  
08:29:40 20 not conceded any liability. If the Government conceded  
21 liability, we would maintain that, perhaps, the situation would  
22 be different. But the fact that the Government has not conceded  
23 liability makes this case far different from the case of  
24 Halliburton Energy Services; and furthermore, apportionment of  
08:29:59 25 liability and the divisibility is a critical factor. It shifts

1 the burden of proof from the Plaintiff to the Defendant as part  
2 of a defense on a liability claim.

3           So we do believe that the joint and several  
4 liability claim that we're making here is quite important, and  
08:30:15 5 it's -- the precedent is the Fifth Circuit in In Re: Bell  
6 Petroleum Services; and in fact, it would be consistent with  
7 this Court's decision in Halliburton Energy Services.

8           THE COURT: All right. That's helpful, thank you.

9           MR. STEINWAY: Let me turn to the statute of  
08:30:29 10 limitations argument, your Honor.

11           THE COURT: Of course, the Government has conceded  
12 owner liability as to some of these facilities, just not  
13 operator liability.

14           MR. STEINWAY: Not for operator liability.

08:30:43 15           THE COURT: And not arranger liability.

16           MR. STEINWAY: Not arranger. But if this Court  
17 granted our motion on operator liability, the Government being a  
18 covered party as an operator, then, since they've admitted all  
19 the prima facie elements, that would satisfy our prerequisites  
08:30:58 20 for a 107 claim and the imposition of joint and several  
21 liability. Our position is it's straightforward according to  
22 all the cases.

23           THE COURT: All right.

24           MR. STEINWAY: As to the statute of limitations  
08:31:09 25 argument, your Honor, you've asked once in awhile what is our



1 best case and what is our worst case. I'd like to answer that  
2 question.

3 THE COURT: Good.

4 MR. STEINWAY: Our best case is two: one case the  
08:31:20 5 Government hasn't mentioned, the case of LWD PRP Group which  
6 just came down; and we just gave you a notice of supplemental  
7 authority there. In that case, three fundamental points: one,  
8 the Government in that case -- the Plaintiffs in that case,  
9 rather, had both voluntary and involuntary costs, much like our  
08:31:41 10 situation; two, the Court in that case used (g) (2) -- 113(g) (2)  
11 as a basis for statute of limitations; and three, in that case  
12 the Court said there was no exclusive remedy. So that's one of  
13 our best cases.

14 We believe the other best case is the Fifth  
08:31:59 15 Circuit decision in Geraghty & Miller. In that case, as the  
16 Government counsel has recognized -- we would agree that  
17 Geraghty & Miller was based on a legal status prior to the  
18 Supreme Court's rulings in this area. However, we think it's a  
19 fundamental notion of law that not only do you look at the prior  
08:32:20 20 rulings but you also look at the rationale of the Court in  
21 reaching those rulings as dispositive of precedent in  
22 influencing decisions.

23 In Geraghty & Miller the Court faced three  
24 options. The Court said in the Fifth Circuit, one, we have  
08:32:34 25 three options here. We can say there's no statute of

1 limitations; Option Two, we could say there's a three-year  
2 statute of limitations under (g) (3); or three, we could have a  
3 six-year statute of limitations under (g) (2).

4 The Court picked (g) (2), the six-year statute of  
08:32:49 5 limitations, because of the words "an initial action for  
6 recovery of costs." In that case, exactly similar to the case  
7 here, this is an initial action for recovery of costs.  
8 Following the same language of -- same rationale of Geraghty &  
9 Miller, we would argue again it should not be (g) (3). At the  
08:33:10 10 very worst, it should be (g) (2).

11 And furthermore, one of the key points from a  
12 rationale perspective in the Geraghty & Miller case is the Court  
13 fought hard to avoid imposing words on the statute. (g) (3)  
14 enumerates -- 113(g) (3) enumerates the various types of statute  
08:33:35 15 of limitations and the claims that are subject to that  
16 particular provision.

17 There -- this limitation applied to judgments and  
18 three categories of settlements. The categories of settlements  
19 are 122(g), de minimis; 122(h), cost recovery; and  
08:33:52 20 judicially-approved settlements. Those types of settlements are  
21 cost reimbursement settlements that deal with common liabilities  
22 and payments to third parties. That's far different than our  
23 situation here.

24 And so we don't think that (g) (3) would apply;  
08:34:05 25 and we think that the Geraghty & Miller Court, the Fifth

1 Circuit, worked hard to avoid putting words into (g) (3) that  
2 weren't there; and that's part of the rationale that led them to  
3 (g) (2) .

4 So while the basis for Geraghty & Miller may  
08:34:20 5 admittedly be changed based on the Supreme Court's decision, the  
6 rationale of the Court still remains vital and effective and  
7 should govern the case here.

8 The bad case is Whittaker, and we don't think  
9 Whittaker applies; but if it was a bad case, that would be the  
08:34:38 10 case. In Whittaker --

11 THE COURT: How do you distinguish it briefly?

12 MR. STEINWAY: We distinguish Whittaker very simply,  
13 your Honor. Whittaker dealt -- and the Court was extremely  
14 clear about this -- dealt with an (f) (1) situation during and  
08:34:49 15 following a 106 and --

16 THE COURT: All right. Now I understand that  
17 distinction.

18 MR. STEINWAY: What -- we have a number of points, and  
19 I don't know where to begin. But factually, we would disagree  
08:35:06 20 with the Government on the facts of the situation. They've  
21 misrepresented the situation. We have a group of voluntary  
22 costs. We voluntarily cleaned up what we call Separator 2, 3M,  
23 10, the upper and lower canal and the --

24 THE COURT: You mean not because the settlement  
08:35:24 25 required it?

1 MR. STEINWAY: Right. And the settlement, in our  
2 view, if it covers anything at all, only covers costs within the  
3 scope of the settlement. That's clear from the statutory  
4 language and the interpretation of the statute. And we -- there  
08:35:37 5 is work being done voluntarily outside the scope of the  
6 settlement.

7 THE COURT: Is there a dispute as to the amount of  
8 work beyond the settlement scope or the settlement requirements  
9 that's being done?

08:35:49 10 MR. STEINWAY: Yes, your Honor.

11 THE COURT: And if there is a dispute, does that mean  
12 that I simply -- again, the Government is just asking me to deny  
13 summary judgment, right?

14 MR. STEINWAY: I believe so.

08:36:01 15 THE COURT: And you're telling me it's disputed. Why  
16 doesn't that sort of support the Government's argument, you  
17 should deny summary judgement because there are material factual  
18 disputes that raise -- that have to be resolved?

19 MR. STEINWAY: But those issues don't go to the  
08:36:15 20 question of operator liability, they go --

21 THE COURT: No, I'm not talking about operator  
22 liability. It's still -- I mean, on this point, if I understood  
23 you correctly, your -- and maybe I'm getting confused because it  
24 is late. But you have repeatedly reminded me that you are not  
08:36:33 25 asking for summary judgment --

1 MR. STEINWAY: Correct.

2 THE COURT: -- you are asking me to deny their motion  
3 for summary judgment.

4 MR. LYNK: Yes.

08:36:37 5 THE COURT: And if there are disputed fact issues  
6 material to determining this, shouldn't I deny your motion for  
7 summary judgment?

8 MR. STEINWAY: With respect to the disputed -- I  
9 understand, your Honor; but we do not think there's a dispute  
08:36:51 10 over the fact that the FOA work is outside the scope outside of  
11 the settlement.

12 THE COURT: And that's the only point in which you're  
13 seeking 113 relief or seeking denial of their motion for summary  
14 judgment on the basis of 113 preclusion?

08:37:11 15 MR. LYNK: Yes. I mean --

16 THE COURT: All right. Fair enough. That clarifies  
17 it. Okay. That's helpful. Thank you.

18 MR. STEINWAY: One of the --

19 MR. LYNK: Let me be clear, 113(f) precluding  
08:37:21 20 107(a) --

21 THE COURT: Yes.

22 MR. LYNK: -- and that -- and also that the claim is  
23 too late, although, again, we've not moved yet to dismiss the --

24 THE COURT: I understand.

08:37:28 25 All right, go ahead.

1 MR. BUTHOD: Conceptually -- let me just real quickly.  
2 If there's a fact issue on a defensive issue for which the  
3 Defendant has the burden of proof --

4 THE COURT: No. I understand. I don't need a 56  
08:37:42 5 lecture now. Yeah, that's all right. I got Rule 56.

6 MR. LYNK: And again, a fact issue on which we believe  
7 we've not had the chance for discovery and could not have had.

8 THE COURT: You're not asking me for a continuance  
9 under Rule 56 either.

08:37:48 10 MR. LYNK: No.

11 THE COURT: So go ahead.

12 MR. STEINWAY: The Government's characterization --  
13 many of the Government's characterizations of the cases that  
14 they've cited to your Honor we would disagree. We would make  
08:38:00 15 just a couple of fundamental points in the interest of time.

16 THE COURT: I appreciate that.

17 MR. STEINWAY: First, we believe a 107 claim can be  
18 maintained with the 113 claim. The LWD case stands for that  
19 proposition. We think that all the cases the Government has  
08:38:19 20 cited are distinguishable for various reasons. For example,  
21 Solutia -- the Government cites Solutia as a particular case  
22 where an exclusive remedy had to be 113.

23 In that case -- the exclusive remedy had to be  
24 113 because in that case the Government had cut -- granted  
08:38:38 25 contribution protection to the Defendants in that case. So

1 there would be gamesmanship played if a 107 action had been  
2 brought.

3 Here, the Government has not granted us any  
4 contribution protection. So the concern about doing end-runs  
08:38:54 5 around settlements that have contribution protection do not  
6 apply.

7 Second, joint and several liability. Some of  
8 these cases were concerned about joint and several liability.  
9 Here, in contrast, joint and several liability has already been  
08:39:07 10 blunted by the fact that the Government has brought a  
11 counterclaim.

12 Our point is that all the cases the Government  
13 has cited for the proposition that an exclusive remedy in terms  
14 of 113(f) (3) (B) should apply are distinguishable from the  
08:39:24 15 situation that we have at hand. We'll lay all this out for you,  
16 your Honor, in our papers.

17 In any event, we do believe that the cases  
18 suggest that 107 claims can still be maintained with 113. We  
19 cite to Bernstein which said in a 2002 ROD --

08:39:45 20 THE COURT: I need to interrupt. Is there a  
21 distinction between voluntary arrangement and the required  
22 actions under the settlement as the Government argued?

23 MR. STEINWAY: Yes, there is, your Honor. But now,  
24 the case law has been extended. In the old -- prior to recent  
08:40:02 25 case law, there was -- the Court --

1 THE COURT: When does "recent case law" start?

2 MR. STEINWAY: The FMC case and Zotos in the Second  
3 Circuit.

4 THE COURT: All right.

08:40:12 5 MR. STEINWAY: The Supreme Court in ARC recognized  
6 that the distinct remedies apply in distinct and different  
7 procedural circumstances. And the Court recognized that 107  
8 actions apply for voluntary and direct cleanups and contribution  
9 actions apply when there's a reimbursement or a common party  
08:40:30 10 liability situation.

11 But the Courts have now recognized that 107  
12 actions can even be extended to comply -- to apply to compelled  
13 cleanups. So it addresses the overlap that the Supreme Court  
14 recognized in the footnote --

08:40:45 15 THE COURT: So the distinction of the bad cases that  
16 the Government made based upon a voluntary agreement you think  
17 goes by the wayside?

18 MR. STEINWAY: Yes, your Honor

19 MR. BUTHOD: The LWD case that's submitted out of  
08:41:00 20 Kentucky talks about the exact topic.

21 THE COURT: All right.

22 MR. STEINWAY: And as to the time barring situation,  
23 the Government cites the Aviall for the proposition that all  
24 contribution actions ought to fit into the (g) (3) contribution  
08:41:15 25 box. That's an inference that's made that must be trumped by



1 the fact of the strict language of the statute.

2           The Supreme Court and this Court in every CERCLA  
3 case has literally parsed the words of each statute. They  
4 relied on the plain language of the statute. Here, the plain  
08:41:31 5 language of the statute is quite clear: (g) -- 122(g), 122(h),  
6 and no other settlements.

7           And so you cannot read the inference that the  
8 Aviall Court said of contribution actions that all of them fit  
9 into the box of (g) (3). That inference doesn't apply. It's  
08:41:52 10 directly contrary to the Supreme Court's parsing out of in  
11 Aviall the language of the words of 113(f) (1) in the first  
12 place.

13           Furthermore, all the cases that have addressed  
14 this issue have looked at (g) (3), and whether they've applied  
08:42:10 15 (g) (3) or not have depended on the exact words of (g) (3). The  
16 Government cites the RSR case as suggesting that it falls within  
17 113(g) (3). Well, RSR dealt with a situation far different than  
18 the situation we have here.

19           RSR dealt with a judicially enforceable consent  
08:42:32 20 decree clearly falling within the square terms of the  
21 judicially-approved bucket of limitations covered by (g) (3). It  
22 dealt with an immediate release, and it dealt with a full no  
23 reservation of rights. That's clearly at odds with the  
24 administrative order consent that we have here.

08:42:52 25           In contrast, ITT can be easily reconcilable with

1 RSR because ITT, again, another Sixth Circuit, dealt with a  
2 situation where there was a conditional precedent to granting --  
3 terminating, much like our situation in the AOC. We'll explain  
4 -- we'll address these issues, your Honor, in our papers for  
5 you.

08:43:15

6 THE COURT: I think you've outlined the basic points,  
7 and that's very helpful.

8 MR. STEINWAY: The bottom line is we see the bucket of  
9 (g) (3) limitations dealing with reimbursement for contribution.

08:43:28

10 This is not a contribution action. This is a cost recovery  
11 action, much more akin to Bernstein and 107 and would fall in  
12 the (g) (2) bucket.

13 And with respect to the 2401 issue, the  
14 Government -- the general statute, there's no -- there's no case  
15 in the country right now, your Honor, who has applied 2401 to a  
16 CERCLA case. In fact, in the Government's brief, they  
17 contradict themselves.

08:43:40

18 On one hand, the Government said the 2401 would  
19 apply to the situation. On the other hand, later on in their  
20 brief, the Government says all the statute of limitations  
21 provisions are covered by CERCLA in the first place. So there's  
22 an inherent contradiction to it.

08:43:54

23 And the final point we'd like to make on that  
24 point is the Government expressly waived sovereign immunity  
25 under 120 of CERCLA. That goes to every defense -- that puts

08:44:08

1 the Government in the same shoes as a private party for purposes  
2 of CERCLA PRP liability. The Government should not have any  
3 special defense such as a special -- special default six-year  
4 statute of limitation that would not apply to the -- to a  
08:44:26 5 private party.

6 The private party and the Government are put in  
7 the same shoes under 120. There's a waiver of sovereign  
8 immunity. There can be no 2401.

9 THE COURT: I'm not going to -- I don't want to reopen  
08:44:37 10 anything, trust me. But I'm struck a little bit by your saying,  
11 on the one hand, there's no special rule for the Government,  
12 including for the consequences of actions that occurred in  
13 wartime, and your earlier statement that, "By golly, we need a  
14 special rule that recognizes the exigencies of wartime  
08:44:56 15 contracting." It's just a little point --

16 MR. STEINWAY: May I --

17 THE COURT: -- as we're talking about the internal  
18 inconsistencies that this -- that --

19 MR. STEINWAY: May I address that point, your Honor?

08:45:09 20 THE COURT: Yes, you can. And I understand that the  
21 statute of limitations kicks in on -- on recent events that are  
22 well after the wartime events; and I do understand that. If  
23 that was where you were going, I think I get that.

24 MR. STEINWAY: We think -- with the special rule here,  
08:45:25 25 we're just saying the Government and the private parties are in

1 the same footing pursuant to 120 of CERCLA which waived the  
2 Government's --

3 THE COURT: No, no, no. I understand what you're  
4 saying. I understand what you're saying, and I was just taking  
08:45:37 5 a somewhat more abstract view, too abstract.

6 All right. Anything further that is worth saying  
7 at this point?

8 MR. ROWE: Two things, your Honor.

9 THE COURT: Think carefully.

08:45:52 10 MR. ROWE: Two things because I was deferred to  
11 earlier --

12 THE COURT: Yes.

13 MR. ROWE: -- and Exxon made a concession. So I'll  
14 make one, which is easy since I think I know where the judge is  
08:46:01 15 going anyway. This was with respect to the question about the  
16 future costs.

17 We had thought that we know enough about what we  
18 don't know to make the decision now. We don't disagree that an  
19 opportunity to reopen might work. We also acknowledge that this  
08:46:17 20 is not really a summary judgment issue. We thought it was a  
21 reasonable time to do it. So if the Court would like to wait  
22 and explore with us as we go through the case the best solution  
23 to that problem, that's fine with us.

24 Second thing: On scheduling, it seems to me, in  
08:46:32 25 light of all the things we've talked about and having additional

1 briefing, that it may not make sense to go forward with a -- the  
2 rest of the schedule kind of --

3 THE COURT: No, I think that's right. So what I'm  
4 going to do is set a deadline for your briefs two weeks from  
08:46:44 5 Friday, all right?

6 And I'll give you two weeks after that to file  
7 a --

8 MR. ROWE: Thank you.

9 THE COURT: -- ten-page reply, nothing further.

08:46:49 10 MR. ROWE: That is fine.

11 THE COURT: Then we're done with briefing, okay?  
12 Done. Say what you need to say, no more.

13 MR. ROWE: Okay.

14 THE COURT: All right.

08:46:58 15 MR. ROWE: Your Honor, you should be aware -- I just  
16 want to make sure this is okay with you. There's a possibility  
17 that Exxon will shortly serve us a supplemental expert report.  
18 We have not seen it so we don't know whether we're opposed to  
19 it.

08:47:11 20 THE COURT: When is "shortly"?

21 MR. ROWE: End of March, I think.

22 MR. STEINWAY: We haven't had a chance -- our expert  
23 is out of the country, but we're working on it. I just learned  
24 about this --

08:47:20 25 MR. ROWE: Oh. It's already --

1 THE COURT: Is there going to be a dispute on --

2 MR. ROWE: Well, in any event, they're going to serve  
3 it. We haven't decided -- at some point. We haven't decided  
4 whether we're going to oppose it. But if we don't, they've  
08:47:29 5 agreed to a short deposition.

6 THE COURT: That's fine.

7 MR. ROWE: That seems that it would still be worth  
8 doing.

9 THE COURT: I think it might mesh with this schedule  
08:47:36 10 depending on how long it takes after the end of March for the  
11 expert to file its -- his, her, whatever, supplement and for you  
12 to decide whether you oppose it and how you want to respond to  
13 it.

14 MR. ROWE: Thank you, your Honor.

08:47:51 15 THE COURT: All right. Thank you-all.

16 And thanks, in particular, to our court reporter  
17 who I don't think expected to work this late. Thank you.

18 (Proceedings concluded at 8:48 p.m.)

19 C E R T I F I C A T E

20 I certify that the foregoing is a correct transcript  
21 from the record of proceedings in the above-entitled matter, to  
22 the best of my ability.

23

24 By: /s/ Gayle L Dye

05-02-2014

25 Gayle L. Dye, CSR, RDR, CRR

Date